No. 2297

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United States

Circuit Court of Appeals

For the Ninth Circuit.

THE PENNSYLVANIA CASUALTY COMPANY,
Plaintiff in Error,

vs.

A. S. WHITEWAY and C. H. LEE, Copartners as A. S. WHITEWAY & COMPANY,
Defendants in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Idaho, Southern Division.

FILMER BROS. CO. PRINT, 330 JACKSON ST., S. F., CAL.

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INDEX OF PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur. Title heads inserted by the Clerk are enclosed within brackets.]

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[Names and Addresses of Counsel.]

MARTIN & CAMERON, Boise, Idaho,
Attorneys for Plaintiff in Error.

ALFRED A. FRASER, Boise, Idaho,
Attorney for the Defendants in Error.

In the District Court of the Third Judicial District of the State of Idaho, in and for Ada County.

Defendant's Exhibit No. 2, Admitted.

A. S. WHITEWAY and C. H. LEE, Copartners as A. S. WHITEWAY & COMPANY,
Plaintiffs,

vs.

THE PENNSYLVANIA CASUALTY COMPANY,
Defendant.

Amended Complaint.

Comes now the plaintiffs, and for cause of action against the defendant alleges:

1.

That the defendant is a corporation organized and existing under and by virtue of the laws of the State of Pennsylvania and during the times hereinafter mentioned, and now, is engaged in the business of writing employer's liability insurance.

2.

That the defendant did make, execute and deliver to the plaintiff its certain policy of indemnity, indemnifying the assured against loss by reason of the liability imposed upon it by law for damages on ac-

count of bodily injuries, including death, at any time, resulting from such injuries accidentally sustained during the period of the policy, by reason of the business operations described and conducted at the locations named in said policy by all employees of the assured; which said policy was numbered 27,353, and was signed by the president, secretary and general agent of said defendant, and thereby and therein, in consideration of the payment of the premium in the sum of $90.10, the said defendant did thereby insure said plaintiff for the period of one year from the first day of July, 1910, in the manner and form set forth in said policy [1*] of indemnity, a copy of which said policy is hereto attached, marked Exhibit "A" and made a part of this complaint.

3.

That on the 25th day of July, 1910, and prior thereto, one J. C. Irwin was in the employ of the plaintiff as a steelman, whose entire compensation is included in the estimated compensation as shown in statement three of the declarations of said policy, working for said plaintiff on the construction of a brick building between 10th and 11th Streets on Main Street, Boise, Idaho. That at said time and place, while the said J. C. Irwin was working for the plaintiff as aforesaid, he received bodily injuries, accidentally sustained; and that thereafter, on the 13th day of March, 1911, said J. C. Irwin commenced an action in the District Court of the Third Judicial District of the State of Idaho against the said plain-

*Page-number appearing at foot of page of original certified Record.

tiff to recover the sum of $15,656.50, as damages for said injury accidentally sustained by said J. C. Irwin on the 25th day of July, 1910, as aforesaid. That thereafter the said plaintiff herein filed their answer to the complaint of said J. C. Irwin, denying all the material allegations of said complaint; that thereafter said action came on for trial in said court and resulted in a verdict in favor of the said J. C. Irwin and against the plaintiff in this action, for the sum of $7,500 as damages accidentally sustained by said J. C. Irwin while in the employ of this plaintiff as afore stated. The judgment in favor of said J. C. Irwin and against this plaintiff was entered on the 6th day of October, 1911, which said judgment became final on the 6th day of December, 1911.

4.

That on the 26th day of December, 1911, this plaintiff paid in money, in satisfaction of said judgment, the sum of five thousand dollars ($5,000.00), and that said sum, nor any part thereof, has been paid by said defendant to said plaintiff.

5.

That this plaintiff requested said defendant to defend in the name and on behalf of this plaintiff said action brought by said J. C. [2] Irwin against this plaintiff as aforesaid, and said defendant refused and neglected so to do. That by reason of the failure and neglect of said defendant to defend said action this plaintiff was compelled to hire counsel, and did hire counsel and did defend said action at a cost to said plaintiff for attorney's fees in the sum of five hundred dollars ($500) and in court costs in

the sum of forty dollars ($40.00). That the plaintiff has performed and duly complied with all the terms and conditions of said policy upon their part to be kept and performed; that the defendant has failed and neglected to pay said plaintiff said sum of $5,000.00, paid by the said plaintiff to said J. C. Irwin for the injuries acccidentally sustained by him as aforesaid, and has failed and neglected to pay the plaintiff the sum of five hundred dollars ($500.00) as its attorney fee in defending said action, or the sum of forty dollars ($40) as court costs in said action, or any part of the same, and there is now wholly due, owing and unpaid from the defendant to the plaintiff the sum of five thousand five hundred forty dollars ($5,540.00).

WHEREFORE, plaintiff prays judgment against the defendant for the sum of five thousand five hundred forty dollars ($5,540.00) and for costs of this action.

ALFRED A. FRASER,

Attorney for Plaintiff, Residing at Boise, Idaho.

State of Idaho,
County of Ada,—ss.

C. H. Lee, being first duly sworn, deposes and says that he is one of the members of the copartnership of A. S. Whiteway & Co.; that he has read the foregoing complaint and knows the contents thereof, and that he believes the facts therein stated to be true.

C. H. LEE.

Subscribed and sworn to before me this 5th day of January, 1912.

[Notarial Seal] D. T. MILLER,
Notary Public. [3]

Exhibit "A" [to Amended Complaint].

No. 27,353.

THE PENNSYLVANIA CASUALTY COMPANY, of Scranton, Pennsylvania, (hereinafter called the company) does hereby agree with A. S. Whiteway & Company (hereinafter called the assured);

IN CONSIDERATION of the payment of the premium as hereinafter provided and the Declarations on page three of this policy:

1. To Indemnify the Assured, subject to the limits expressed in Statement Four of the Declaration against loss by reason of the liability imposed upon him by law for damages on account of bodily injuries, including death at any time resulting from such injuries accidentally sustained during the period of this Policy by reason of the business operations described and conducted at the locations named in said Declaration by all employees of the Assured as hereinafter provided.

2. To defend in the name and on behalf of the Assured any suits, even if groundless, which may at any time be brought on account of such injuries and to pay all costs taxed against the Assured under any legal proceedings defended by the Company, all expenses incurred in the investigation of such injuries and in the negotiations for settlement, all expenses of the contest of claims arising therefrom, and all

interest on such part of any judgment as shall not be in excess of the limits of the Company's liability as hereinafter expressed.

3. To reimburse the Assured for all expenses incurred by him for such immediate surgical relief as shall be imperative at the time any such injury is sustained.

4. This policy shall cover as above provided: (1) All such injuries sustained at the locations described in the Declarations by all employees of the Assured whose entire compensation is included in the estimated compensation as shown in Statement Three of the Declarations, including also drivers employed by the Assured who are specifically enumerated in any concurrent Teams policy carried by the Assured in this Company while such drivers are engaged in any duties other than those of a driver. (2). [4] All such injuries sustained by such employees caused by any person wholly engaged in clerical or office duties, the Assured himself if the Assured is an individual, any member of the firm if the Assured be a firm, the President, Vice-President, Secretary and Treasurer if the Assured be a corporation, but injuries to the person described in this clause shall not be covered unless the compensation paid to such persons is included in the estimated compensation. (3). All such injuries sustained by drivers, and their helpers, lumpers, stevedores, loaders, material handlers, time-keepers, pay-clerks and messengers whose entire compensation is included in the estimated compensation upon which the premium for this policy is computed, wherever they may be in the

service of the assured in connection with the business operations described in the Declarations. This policy shall not cover the injuries sustained by any person or persons except as above provided no*t* any injuries occasioned by reason of the failure of the Assured to observe any statute *e*ffecting the safety of persons, nor any injuries occasioned by reason of the failure of the Assured to observe any local ordinance of which he has knowledge nor any injuries sustained or caused by any person employed by the Assured in violation of law as to age or under the age of fourteen years if there is no legal age limit, or by any contract convict laborer, nor liability of others assumed by the Assured under any contract or agreement, oral or written.

THESE AGREEMENTS ARE SUBJECT TO THE FOLLOWING CONDITIONS:

A. The premium is based upon the entire compensation earned during the policy period by all employees of the Assured, not herein elsewhere specifically excluded, engaged in connection with the operations described in and covered by this Policy. The premium is subject to adjustment at the termination of the policy or at the end of each period of one year if the policy be written for a longer term, when the Assured shall furnish to the Company for the purpose of said adjustment a written Declaration of the exact amount of compensation [5] earned by the said employees during the said period. If the earned premium computed thereon at the rate or rates specified in Statement Three exceeds the estimated premium paid, or such portion of it as

represents the premium for the annual period, the Assured shall immediately pay the additional amount to the company; if less, the Company shall return to the Assured the unearned premium, but except in the event of cancellation by the Company or by the Assured when the Assured is retiring from business, the Company shall receive or retain the minimum premium provided in Statement Twelve. The word "Compensation" used in this paragraph shall include all salaries, wages and other sums paid for regular time, overtime, piece work or for allowances and also the cash equivalent of all board, merchandise, store certificate, credits or any other substitute for cash.

B. This policy may be cancelled by the Company at any time by written notice served on or sent by registered letter to the Assured at the address given herein, stating when the cancellation shall be effective. It may be cancelled by the Assured by like notice to the Company. If cancelled by the Company, the Company shall be entitled to the earned premium pro rata when determined. If cancelled by the Assured unless the Assured has retired from business, the Company shall receive or retain the customary short-rate premium. (In either case the earned premium shall be computed on the compensation for the year as indicated by the actual compensation earned by the employees of the Assured during the time the policy shall have been in force.) In any case, the Company shall receive or retain the minimum earned premium stated in Statement Twelve. The Company's check mailed to the ad-

dress of the Assured as given herein shall be a sufficient tender, but no return premium shall be payable until a statement of actual compensation earned by the employees of the Assured during the period the policy was in force shall have been furnished to the Company by the Assured. [6]

C. The Company shall be permitted at all reasonable times during the policy period to inspect the plant, works, machinery and appliances covered by this policy and to examine the Assured's books at any time during the policy period or any extension thereof, or within one year after its final expiration so far as they relate to the compensation earned by his employees while this policy was *ub* force.

D. Upon the occurrence of an accident, the Assured shall give immediate written notice thereof to the Company, or its duly authorized agent, with the fullest information obtainable. He shall give like notice with full particulars of any claim made on account of such accident. If thereafter any suit is brought against the Assured, he shall immediately forward the Company every summons or other process served upon him. The Assured when requested by the Company shall aid in effecting settlements, securing evidence, the attendance of witnesses and in prosecuting appeals, and shall at all times render to the Company all co-operation and assistance in his power. He shall not voluntarily assume any liability, except as provided in Paragraph Three of the insuring clause, settle any claims or incur any expense, except at his own cost, or interfere in any negotiations for settlement or legal proceeding with-

out the consent of the Company previously given in writing.

E. No action shall lie against the Company to recover for any loss under Paragraph One of this Policy unless it shall be brought by the Assured for loss actually sustained and paid by him in money in satisfaction of a judgment after a trial of the issue and no such action shall lie to recover under any other agreement unless brought by the Assured himself to recover money actually expended by him. In no event shall any such action lie unless brought within ninety (90) days after the right of action accrues as herein provided.

F. Any limitations or requirement of this Policy as respects time for notice of accident or for any legal proceeding conflicting with the law of the State in which the policy is issued shall be construed as amended to conform with such law. [7]

G. No assignment of interest under this Policy shall bind the Company unless the consent of the Company shall be endorsed hereon.

H. If the Assured shall carry a policy of another insurer, whether valid or not, against a loss covered by this policy, the Assured shall not be entitled to recover from the Company a larger proportion of the entire loss than the amount hereby insured bears to the total amount of his insurance.

I. In the case of payment of loss under this Policy, the Company shall be subrogated to all rights of the Assured against any person or corporation, as respects such loss, to the amount of such payment, and the Assured shall execute all papers required

and shall co-operate with the Company to secure to the Company such rights.

J. No condition or provision of this Policy shall be waived or altered except by endorsement attached hereto signed by the President, Vice-President, Secretary or Assistant Secretary of the Company; nor shall any notice to any agent, nor shall knowledge possessed by any agent or by any other person, be held to effect a waiver or change in any part of this contract. The personal pronoun herein used to refer to the Assured shall apply regardless of number or gender.

K. Statements of the Declarations on page three of this Policy, numbers One to Twelve inclusive, are warranted by the Assured to be true and correct except such as are declared to be matters of estimate only. This Policy is issued in consideration of and upon the faith of such warranties. The provisions of the policy respecting its premium and the payment of the premium as expressed in the Declarations.

IN WITNESS WHEREOF, The Pennsylvania Casualty Company of Scranton, Pa., has caused this policy to be signed by its President and Secretary at Scranton Pa., and countersigned by a duly authorized agent of the Company.

THOMAS E. JONES,
President.

F. H. KINGSBURY,
Secretary.

Countersigned at Seattle, Washington, the 1st day of July, 1910.

HANFORD & DE VEUVE,
General Agents.
BRADLEY SHEPPARD,
Agent, Boise, Idaho. **[8]**

DECLARATIONS.

Statement 1.

Name of Assured, A. S. Whiteway & Company.

Address, Boise, Idaho.

Individual, co-partnership, corporation or estate, Co-partnership.

Statement 2.

The Policy Period shall be from June 27th, 1910, to June 27th, 1911, at 12 o'clock noon. Standard Time, at Assured's Address as to each of said dates.

Statement 3.

A full description of the operations covered by this policy, the locations of all places where such operations are conducted, the estimated average number of employees engaged therein, the estimated compensation of such employees for the term of this policy, the premium rate or rates, and the estimated premium, are given hereunder:

Location of all places where business Operations are to be conducted: Between 10th & 11th Sts., on Main St., Boise, Idaho, Lot 4, Blk. 16,

Description of business Operations to be Insured: Constructing four story brick building; Masons, Bricklayers, Carpenters, Plasterers, Painters, Steelmen, Electric wiring, Sheet-metal workers.

	Estimated Average No. of Employees.	Estimated total of Annual Wages and Other Compensation.	Rate per $100 of wages.	Estimated Premium.
Masons, Bricklayers	10/20	1000.00	2.25	22.50
Carpenters	10/20	2000.00	2.25	45.00
Plasterers	5/10	800.00	1.20	9.60
Painters	5.10	250.00	1.20	3.00
Steelmen	5/10	50.00	6.50	3.25
Electric Wiring	3/5	250.00	1.50	3.75
Sheet Metal Workers	2/5	100.00	3.00	3.00

Total Estimated Premium: Ninety and 10/100 Dollars.....$90.10

Statement 4.

The Company's limit of liability, whether only one or more than one interest is covered by this policy, exclusive of expenses referred to in paragraphs Two and Three of the insuring clause of the policy, for death or injury to one person shall be Five Thousand and no/100ths Dollars ($5000.00) and subject to the same limit for each person, the Company's total liability (exclusive of said expense) on account of any one accident causing death or injury to more than one person, shall be limited to Ten Thousand and no/100ths Dollars ($10,000.00).

Statement 5.

The foregoing enumeration of employees includes all persons in the service of the Assured in connection with the operations described herein at the places of such operations and elsewhere to whom compensation of any nature is paid or allowed, ex-

cept the members of the Assured if a co-partnership, the President, Vice-President, Secretary or Treasurer if a Corporation, any drivers employed by the Assured who [9] are covered in any concurrent Teams Policy carried in this Company, or persons wholly engaged in clerical or office duties. The foregoing estimated compensation is offered for the purpose of computing the estimated premium and shall include the entire compensation (by which is meant all salaries, wages, or other sums paid for regular time, over-time, piece work or for allowances and also the cash equivalent of all board, merchandise, store certificates, credits or any other substitute for cash) earned by all employees in the service of the Assured engaged in connection with the operations hereinbefore described.

Statement 6.

No further exclusions shall be made from the payroll except as herein stated . . . . No exceptions.

Statement 7.

None of the special operations described will be covered unless the estimated average number of persons engaged in such special operations and their estimated compensation and the premium rate are specifically stated herein.

Statement 8.

No explosives are made, sold, kept or used in the business described herein, except as herein stated. . . . . No exceptions.

Statement 9.

No operations of any nature not herein disclosed

are conducted by the Assured at the places covered hereby except as herein stated. No exceptions.

Statement 10.

The estimate of wages or other compensation does not include wages paid by independent subcontractors, except as herein stated. No exceptions.

Statement 11.

No similar insurance has been declined or canceled by any company during the three years last past, except as herein stated. No exceptions.

Statement 12.

The minimum premium for this policy shall be Fifty and no/100ths dollars ($50.00).

[Endorsed]: Filed Feb. 23, 1912. A. L. Richardson, Clerk. **[10]**

In the District Court of the United States, in and for the Judicial District of the State of Idaho, Southern Division.

A. S. WHITEWAY and C. H. LEE, Copartners as A. S. WHITEWAY and COMPANY,

Plaintiff,

vs.

THE PENNSYLVANIA CASUALTY COMPANY,

Defendant.

Answer to Amended Complaint.

Comes now the defendant and answers the complaint as amended:

1.

Denies that defendant did make, execute and deliver, or make or execute, or deliver to the plaintiff its certain or any policy of indemnity, indemnifying the assured against loss by reason of the liability, imposed upon it by law or otherwise or at all, on account of bodily injuries, including death, or for any other reason or at all, at any time, resulting from such injuries, accidentally, or otherwise sustained during the period of the, or any, policy or any time or at all, by reason of the business operations described and conducted at the locations named in said policy, or any other place, or at all, by any or all employees of the assured, or for any other reason or at all, except and only as stated in the written agreement entered into between plaintiff and defendant referred to in plaintiff's complaint as Exhibit "A," and a true copy of which said agreement is hereto attached, made a part of this answer and referred to as Exhibit "1" and not otherwise. [11]

Denies that thereby and therein, or thereby or therein, in consideration of the payment of the premium in the sum of ninety and ten hundredths ($90.10) dollars, or for any consideration of the payment of the premium, or any premium in the sum of ninety and ten hundredths ($90.10) dollars, or any other consideration, payment, premium, sum or

amount whatsoever, the defendant did insure said plaintiff for the period of one year, or for any other term or period whatsoever except as set forth in Defendant's Exhibit "1" hereunto attached and made a part hereof as above said.

3.

Denies that on the 25th day of July, 1910, and prior thereto, or at any time or at all J. C. Irwin was in the employ of the plaintiff as a steelman, at any place, and denies that on said date, and prior thereto, or prior thereto, or at any time or at all, J. C. Irwin, was in the employ of the plaintiff as a steelman, whose entire compensation is included in the estimated compensation as shown in statement three of the Declaration of said policy, to wit, the contract referred to as Exhibit "A" of plaintiff's amended complaint and Exhibit 1 of defendant's answer to said amended complaint. Denies that at said time and place, or at any time or place, said J. C. Irwin received bodily injuries while working as a steelman, or as a steelman whose entire compensation is included in the estimated compensation as shown in statement three of the declarations of said policy, but admits that said J. C. Irwin received bodily injuries. Denies that said agreement was numbered and signed or numbered or signed in any manner whatsoever except as shown in Exhibit "1" hereunto attached.

4.

That as to the allegation—

"That on the 26th day of December, 1911, this plaintiff paid in money in satisfaction of such judgment, the sum of five thousand [12]

($5.000) Dollars, and that said sum nor any part thereof has been paid by said defendant to said plaintiff."

the defendant has no information or belief upon the subject sufficient to enable it to answer said allegation and placing its denial upon that ground, denies that on the 26th day of December, 1911, or at any other time, or at all, plaintiff paid in money or in any other manner whatsoever in satisfaction of said judgment, or any judgment the sum of five thousand ($5,000.00) dollars, or any other sum or amount whatsoever.

5.

Denies that by reason of the failure and neglect, or the failure or neglect of said defendant to defend said action, the plaintiff was compelled to hire counsel, and did hire counsel, or did hire counsel and defend or defend said action at a cost to said plaintiff for attorney's fees in the sum of $500 or in any other sum or amount, and in court costs, or in court costs in the sum of $40, or in any other sum or amount whatsoever.

6.

Denies that plaintiff has performed and duly complied with or duly complied with, or complied with all or any of the terms and conditions of said policy or agreement, Exhibit 1, upon plaintiff's part to be kept and performed.

7.

Denies that there is now due and owing or due or owing from defendant to plaintiff the sum of $5,540, or any other sum or amount whatsoever.

Further answering plaintiff's amended complaint, and for a first defense, defendant alleges:

That at all times during the life of said contract, Exhibit 1, referred to above, and such references made a part of this defense, **[13]** and up to the time the complaint was filed herein, the defendant has performed and complied with in a due, good and substantial manner all of the terms and conditions of its said contract, Exhibit 1, with plaintiff upon the part of defendant to be kept and performed.

Further answering plaintiff's amended complaint and for a second defense, defendant alleges:

That prior to the 27th day of June, 1910, the plaintiff was a general contractor constructing works, structures and buildings by the labor of men and employees hired and engaged by plaintiff to do work in their respective lines or trades upon the works, structures and buildings to be built by the plaintiff; that in such work the plaintiff was accustomed to hire and did hire and employ common laborers, drivers, carpenters, plasterers, painters, electrical workers, bookkeeper, timekeepers, engineers, material handlers, steelmen, sheet-metal workers, lawyers, doctors and many other employees of divers trades and professions; that on or about the 27th day of June, 1910, the plaintiff had commenced or was about to commence the construction of the building known as the Tiner Building, now known as the Boz Theatre Building, at the location on Main Street in Boise, Idaho, set forth in the Exhibit 1, referred to in this answer; that in the construction of that particular building the plaintiff had hired and engaged or was

contemplating the hiring and engaging or did afterwards hire and engage common laborers, drivers, carpenters, plasterers, painters, electrical wirers, bookkeepers, timekeepers, engineers, material handlers steelmen, sheet-metal workers, lawyers, doctors, and other employees of divers trades and professions; that on or about the 27th day of June, 1910, plaintiff asked defendant for indemnity insurance on certain classes of laborers in and about the construction of the said building, and inquired from defendant what the rate would be on each class which plaintiff desired to insure and desired to be covered by said contract of indemnity; that plaintiff was given by [14] defendant rates for 10 to 20 masons and bricklayers, such rate on masons and bricklayers being $2.25 per $100 of wages; that the estimated amount to be paid such masons and bricklayers was $1,000; for 10 to 20 carpenters, such rate on carpenters being $2.25 per $100 of wages; the estimated amount to be paid such carpenters was $2,000; for 5 to 10 plasterers, such rate on plasterers being $1.20 per $100 of wages, and the estimated amount of compensation to be paid such plasterers was $800; for 5 to 10 painters, such rate on painters being $1.20 per $100 of wages, and the estimated amount of compensation to be paid such painters was $250.00; for 5 to 10 steelmen, such rate on steelmen being $6.50 per $100 of wages, and the estimated amount of compensation to be paid such steelmen was $50.00; for 3 to 5 electric wirers, such rate of electric wirers being $1.50 per $100.00 of wages, and the estimated amount of compensation to be paid

such electric wirers was $250.00; for 2 to 5 sheet-metal workers, such rate on sheet-metal workers being $3.00 per $100 of wages, and the estimated amount of compensation to be paid such sheet-metal workers was $100; and after receiving such rates from the defendant, on or about the date above said, plaintiff contracted with defendant for the insurance of plaintiff against loss by reason of the liability imposed upon plaintiff by law for damages on account of bodily injuries, including death, at any time resulting from such injuries accidentally sustained during the period, June 27th, 1910, to June 27th, 1911; by reason of the business operations described and conducted at the place designated in the said Exhibit 1; by the masons, bricklayers, carpenters, plasterers, painters, steelmen, electric wirers, and sheet-metal workers employed by the plaintiff, whose entire compensation was included in the estimated compensation shown in Statement three of the Declarations of Exhibit 1, the contract between plaintiff and defendant; that defendant had rates and insured other classes of [15] laborers if such insurance was asked for, but plaintiff did not ask for rates on common laborers and did not contract for the insurance of its common laborers or any other classes of workmen except those expressly mentioned in the said contract Exhibit 1, between plaintiff and defendant; that said J. C. Irwin, at all times he was in the employ of the plaintiff, was a common laborer, and was not covered by said contract between plaintiff and defendant; that all agreements above referred to in this contract as having

been entered into by plaintiff and defendant are the agreements set forth in Exhibit 1, and not otherwise.

B.

That on or about the 27th day of June, 1910, defendant agreed with plaintiff to defend in the name and on behalf of the plaintiff any suits, even if groundless, which might at any time be brought on account of injuries to the employees covered and included in said contract, Exhibit 1, to wit, said masons, bricklayers, carpenters, plasterers, painters, steelmen, electric wirers and sheet-metal workers; and no others, and that said J. C. Irwin was not one of the classes of workmen included as above said, but was a common laborer, and that defendant owed plaintiff no duty to defend said suit brought by the said J. C. Irwin against plaintiff, nor to pay the costs of said suit or to pay the attorney's fees which plaintiff alleges was contracted to be paid in said suit on its behalf.

That the defendant had a rate for the insuring of common laborers on such work as the plaintiff was contracting to do, but that plaintiff failed and neglected to insure its common laborers, and did not pay any rate of insurance upon its common laborers, and failed and neglected to contract with defendant for such insurance upon its common laborers, and that by reason of such failure and neglect to insure its common laborers and not by reason of any act or omission of or on the part of the defendant, the plaintiff itself assumed the **[16]** liability for the injury to any of its common laborers on account of

plaintiff's negligence.

FOR A FURTHER AND THIRD DEFENSE, defendant alleges:

1.

That on or about the 27th day of June, 1910, plaintiff agreed with the defendant, in consideration of the premises of the defendant set forth in said contract, that plaintiff would give notice with full particulars of any claim made on account of accident to any of plaintiff's employees insured, and plaintiff further agreed that if any suit was brought after the occurrence of an accident to any of plaintiff's employees insured by said contract, that plaintiff would immediately forward to the defendant every summons or other process served upon plaintiff; plaintiff further agreed that plaintiff would not interfere in any negotiations for settlement or legal proceedings without the consent of the defendant previously given in writing; that plaintiff failed to perform each and every of such agreements in this, that on the 17th day of December, 1910, without the consent or even the knowledge of defendant, the plaintiff waived the notice of injury and intention to sue required by the statute of Idaho, both as to time and sufficiency thereof and also as to the sufficiency of the service thereof, in the words following, to wit: "Service of the foregoing notice by copy is hereby accepted, this 17th day of December, 1910, by the undersigned, who was on July 25th, 1910, and now is a member of the firm of Whiteway and Company, and I hereby waive for the firm any objection to the sufficiency of said notice, having been present

in person at the time of the injury referred to in said notice and to the sufficiency of the service thereof," thus aiding the said J. C. Irwin in overcoming the statutory requirement necessary to be met before he could bring suit upon the statutory liability provided in the Laws of 1909, Session Laws of Idaho, at page 34, and the act following that page; that plaintiff further interfered with [17] settlement and broke the said agreement in this, that on or about the 1st day of September, 1910, plaintiff told an attorney to go and see said J. C. Irwin concerning bringing suit against the defendant, and plaintiff turned over papers and documents to said attorney to aid said attorney in commencing and prosecuting said suit to be brought by the said J. C. Irwin.

FOR A FURTHER AND FOURTH DEFENSE, defendant alleges:

1.

That on or about the 26th day of July, 1910, plaintiff represented to this defendant that the said J. C. Irwin was a common laborer and working as such for plaintiff at the time of his injury; that at many times and on all occasions when the matter came up the plaintiff always represented to the defendant and others that the said J. C. Irwin was a common laborer and so stated; that defendant relied upon such statements and representations by the plaintiff to the effect that said J. C. Irwin was a common laborer; that defendant believed such statements and representations and now believes them that said J. C. Irwin was a common laborer at the time said Irwin

was in the employ of the plaintiff; that the fact that said Irwin was not a common laborer was not known to the defendant and is not now so known; that if said statements and representations so made as above said by the plaintiff to the effect that said Irwin was a common laborer were not true, then such statements and representations were certainly made with gross negligence on the part of plaintiff; that said statements and representations were made in great part by the plaintiff to the defendant before the plaintiff requested or intimated that plaintiff wanted defendant to defend the said suit brought by the said Irwin against the plaintiff; that relying upon said statements and representations by the plaintiff, that said J. C. Irwin was a common laborer at the time of his employment with plaintiff, and believing said statements and representations [18] to be true, the defendant refused to defend said suit brought by the said J. C. Irwin against the plaintiff herein, and that plaintiff herein has at all times since the commencement of said suit and during the progress of said suit, stated, represented, and acquiesced in the statements, and representations that said Irwin was a common laborer in and during the time he was employed by the plaintiff that relying upon, believing in, because of and on account of such statements and representations of plaintiff the defendants were caused an irretrievable loss, if plaintiff be permitted to prove the fact to be otherwise that plaintiff has stated and represented, to wit, the defendant has lost the right to its day in court to defend said suit brought by said Irwin against the plaintiff; that the

said judgment in the said Irwin case against the plaintiff is final and that defendant could in no way obtain that which is secured to it by its rights under the said contract; that the plaintiff has never intimated by word, act or deed otherwise than that said J. C. Irwin was a common laborer until plaintiff's attorney asked leave to stipulate in this court on the 24th day of September, 1912, that plaintiff be allowed to amend its complaint so that said amended complaint should contain the allegation that said J. C. Irwin was a steelman during his employment with the plaintiff instead of a common laborer as had always theretofore been represented, stated, believed and pleaded; that by reason of the said representations made by the plaintiff as above said, and by reason of the reliance placed thereon and the belief given thereto by defendant, and by reason of the fact that defendant has believed, relied and acted upon said representations and statements to its damage and loss as above said, the plaintiff herein is estopped to prove that said Irwin is other than or was other than a common laborer at the time of his employment with plaintiff and that said plaintiff is estopped to deny that said J. C. Irwin was a common laborer at said time. [19]

WHEREFORE, defendant prays that plaintiff take nothing in this cause and that defendant be hence dismissed with its costs and disbursements in this action.

MARTIN & CAMERON,

Attorneys for the Defendant, Residence and Post-office Address of Defendant's Attorneys, Boise, Idaho.

State of Idaho,
County of Ada,—ss.

Bradley Sheppard, being first duly sworn, deposes and says that he is the resident agent of the defendant herein; that he as such is authorized by the said defendant to make this verification; that he has read the foregoing answer and knows the contents thereof and that the same is true as he verily believes; that the reason this verification is not made by some officer of the defendant is that said officers reside outside of Ada County, State of Idaho.

BRADLEY SHEPPARD.

Subscribed and sworn to before me this 4th day of October, 1912.

[Notarial Seal] P. MARTIN,
Notary Public.

Copy of the foregoing answer served on me this 4th day of October, 1912, at Boise, Idaho.

ALFRED A. FRASER,
Attorney for the Plaintiff.

(Exhibit No. 1 omitted, being the same as Exhibit "A" attached to the Amended Complaint.)

[Endorsed]: Filed October 4, 1912. A. L. Richardson, Clerk. [20]

In the District Court of the United States, Southern Division, District of Idaho.

A. S. WHITEWAY and C. H. LEE, Copartners as A. S. WHITEWAY & COMPANY,

Plaintiffs,

vs.

THE PENNSYLVANIA CASUALTY COMPANY,

Defendant.

Stipulation [Re Amendment of Complaint, etc.].

IT IS HEREBY STIPULATED AND AGREED by and between counsel for the respective parties herein that the plaintiff may amend the complaint on file herein by striking therefrom the words "common laborer" and inserting by interlineation in place therefor the words "steelman whose entire compensation is included in the estimated compensation as shown in Statement Three of the Declarations of said policy," and waiving the reverification of said complaint. And that the defendant may have ten days from and after this date within which time to answer said complaint as amended, and that the trial of this action shall not be had prior to the 17th day of October, 1912.

Dated this 24th day of September, 1912.

ALFRED A. FRASER,
Attorney for Plaintiff,
MARTIN & CAMERON,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 17, 1913. A. L. Richardson, Clerk. [21]

In the District Court of the United States, District of Idaho.

A. S. WHITEWAY and C. H. LEE, Copartners as A. S. WHITEWAY & COMPANY,

Plaintiff,

vs.

THE PENNSYLVANIA CASUALTY COMPANY,

Defendant.

Waiver of Jury Trial.

It is hereby stipulated by and between the respective parties to the above-entitled action, acting through their attorneys of record hereunto subscribed, that a jury trial of the issues of fact in the above-entitled cause is hereby waived by each of the parties to this cause.

Dated this 15th day of February, 1913.

ALFRED A. FRASER,
Attorney for Plaintiff,
MARTIN & CAMERON,
Attorneys for Defendant.

[Endorsed]: Filed Feb. 20, 1913. A. L. Richardson, Clerk. [22]

In the District Court of the United States, Southern Division, District of Idaho.

A. S. WHITEWAY and C. H. LEE, Copartners as A. S. WHITEWAY & COMPANY,

Plaintiffs,

vs.

THE PENNSYLVANIA CASUALTY COMPANY,

Defendant.

Judgment.

THIS CAUSE coming regularly on for trial before the Court, a jury having been duly waived in writing by counsel for the respective parties herein, Alfred A. Fraser appearing as attorney for the plaintiff, and Messrs. Martin & Cameron appearing as counsel for the defendant; and the Court having heard the evidence and the testimony of the witnesses and argument of counsel thereon, and after duly considering the same and being fully advised in the premises,

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that judgment be entered herein against the said defendant, the Pennsylvania Casualty Company, and in favor of the plaintiff;

WHEREFORE, by reason of the law and the premises aforesaid, it is Ordered, Adjudged and Decreed that A. S. Whiteway and C. H. Lee, copartners as A. S. Whiteway & Company, plaintiff, do have and recover of and from the said defendant, The Pennsylvania Casualty Company, the sum of

$5,570, with interest thereon at the rate of seven per cent (7%) per annum from the date hereof until [23] paid, together with said plaintiffs' costs and disbursements incurred in said action amounting to the sum of $31.20.

Dated this 19th day of February, 1913.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed February 19, 1913. A. L. Richardson, Clerk. [24]

In the District Court of the United States, District of Idaho, Southern Division.

A. S. WHITEWAY and C. H. LEE, Copartners as A. S. WHITEWAY & CO.,
Plaintiffs,

vs.

THE PENNSYLVANIA CASUALTY COMPANY,
Defendant.

Stipulation Enlarging Time for Filing Bill of Exceptions.

It is hereby stipulated by and between the attorneys for the respective parties that the defendant having shown cause therefor, the time for the signing, allowance and filing of the bill of exceptions of the above-named defendant is extended for the period of forty days from and after the date of this stipulation, to wit: February 25th, 1913, which date is within the ten days after the notice of written de-

(Testimony of C. H. Lee.)

A true copy of the same being attached to and made a part of the complaint.

[Testimony of C. H. Lee, for Plaintiffs.]

C. H. LEE, a witness duly called and sworn on behalf of the plaintiffs, testified as follows:

Direct Examination.

(By Mr. FRASER.)

Q. Where do you reside, Mr. Lee?

A. In Boise.

Q. You are one of the members of the firm of A. S. Whiteway & Company? A. Yes, sir.

The COURT.—Just a moment. I don't see the amended complaint here. It is being tried on an amended complaint, isn't it?

Mr. FRASER.—The amendment was by interlineation.

The COURT.—It is in this transcript?

Mr. FRASER.—Yes.

Mr. MARTIN.—There is a stipulation there that sets the interlineation out.

Mr. FRASER.—The interlineation has been put in, Mr. Martin.

Q. Calling your attention to Plaintiff's Exhibit No. 1, I ask you if that is the policy which you received from the Pennsylvania Casualty Company, as a member of the firm of A. S. Whiteway & Company? A. Yes, sir, that is the policy.

Q. This policy recites that the estimated premium was $90.10. Was that premium paid to the company?

(Testimony of C. H. Lee.)

A. Yes, sir; that was paid to the company. [28]

Q. That was paid to the company? A. Yes, sir.

Q. Were you acquainted with one J. C. Irwin?

A. No, I don't know that I have ever seen the gentleman.

Q. The gentleman that was injured, did you ever see him?

A. I saw him only once, I think,—during the trial.

Q. You didn't see him before that?

A. No, I didn't see him.

Q. Was any payment outside of that estimated premium ever made by you to the company on that policy? A. Yes, sir.

Q. Calling your attention to Plaintiff's Exhibit No. 2 for identification, just state what that was.

A. This was a check paid by Whiteway & Lee to Bradley Sheppard, the agent for the Casualty Company, as a balance due on these premiums.

Mr. FRASER.—Is there any objection to the check, showing payment?

Mr. MARTIN.—Are you offering it?

Mr. FRASER.—Yes.

Mr. MARTIN.—No objection.

(Said check, marked Plaintiff's Exhibit No. 2, was thereupon marked "Admitted.")

Q. What was that payment made for?

A. That was made for the payment that we owed them on the policy, the amount of premium due on the policy. We paid a certain amount there, the estimated cost, when the policy was issued; then, after the expiration of the policy, a settlement was made

(Testimony of C. H. Lee.)

on the balance due. These payments were made on the basis of the payroll, under certain classifications.

Q. Were your books and payrolls checked up by the company, [29] or any agent of the company, to find out the amount of premium which was due to the company under that policy?

A. Yes, sir; our payroll was checked up by an auditor that came here representing the company, after these payments had been made.

Q. These payments you made, $90.10, and this further payment of $34.80, what employees' compensation was included in those payments?

Mr. MARTIN.—We object to that, as the contract itself sets forth the classification of employees that were covered by this policy, and the payments that should have been made under the policy, and they haven't pleaded that we are estopped from denying any liability by reason of their having paid for some one that was not covered by the policy.

Mr. FRASER.—Calling the Court's attention to the provisions of the policy, and then to a decision of the Federal Court, the policy provides, etc. (Reading from policy, and later reading from case in 100 Fed. Rep., 604, at page 606.)

The COURT.—Gentlemen, this is not being tried before a jury. I think I shall be liberal in permitting the introduction of evidence, and, without ruling definitely upon the point which you have raised, I think I shall permit him to answer this question. The point isn't entirely clear in my mind.

(Testimony of C. H. Lee.)

Mr. MARTIN.—I would like an exception at this time, your Honor.

The COURT.—Yes. You may answer the question, Mr. Lee.

A. The premiums was paid upon the entire payroll, [30] everybody enumerated in the different schedules. And I would like to state here that when these schedules were prepared they were prepared by the company, and not by Whiteway & Lee. Mr. Sheppard, the agent of the company, when he came soliciting the work, he made these schedules, and I asked him,—I said: "Now, Mr. Sheppard, you state brick masons as a schedule. What does that include? Does that include simply the brickmen who are laying bricks, or does it include everybody connected with that branch of the work,—the hod-carriers, the mortar-mixers, and the scaffold handlers?" And he said, "Yes, it includes everybody."

Mr. MARTIN.—We would like to have an exception to the testimony of the witness, on the ground that it might tend to vary the written contract. They are suing here on this contract.

Mr. FRASER.—That testimony which the witness has just given is exactly in line with the evidence admitted in the Circuit Court of Appeals case.

The COURT.—I haven't any doubt that the testimony is admissible. Of course it isn't in response to the question. It is competent to show what was said and done at the time, as tending to illuminate the meaning of the phaseology of the contract, as to what is meant by the term "masons" and "bricklayers,"

(Testimony of C. H. Lee.)

for instance. If you insist upon objection on the ground that it is not responsive to the question, I will sustain it.

Mr. MARTIN.—I don't desire to object to it on that ground.

The COURT.—On the other ground the objection will be overruled. I may say that you have exceptions [31] to all adverse rulings of the Court.

Mr. FRASER.—Q. What else was said at that time in regard to these schedules, between yourself and Mr. Bradley Sheppard, if anything?

A. We took up every schedule in succession, in the order in which they are in the policy, and I asked that same question, "Does this policy cover all of the persons employed under these schedules, everybody?" I detailed them just as they come along and he said, "Yes" to each one of them. And the steel was last, and I said, "How about the steel people? We have employed no expert steelmen on a job like this, and does the policy cover everybody working on the steel?" And he says, "Yes, most assuredly, it covers everybody, and you pay a premium on all the wage-earners, no matter what they are working at, in the class under which they are." And he instructed me to keep my payroll separately, so that premiums could be estimated on the classifications. I did so, and he was paid on that basis, and subsequently, as I said before, the auditor came around, and he checked them up along those same lines, including every dollar paid on the payroll, of employees on that building; every dollar paid out, after the policy was issued,

(Testimony of C. H. Lee.)

until the building was completed, was paid for under those schedule rates.

Q. Mr. Lee, was Irwin put in your payroll then under the schedule of "Steelmen"? A. Yes, sir.

Mr. MARTIN.—We move to strike that, on the ground that it is not the best evidence.

The COURT.—Denied.

Mr. FRASER.—Q. Did you pay him the rate of wages that [32] you paid all other men who were working upon the steel part of the structure?

A. Yes; they all received the same wages.

Q. Was the wages you paid him taken into consideration as a part of the basis to fix the premium which you paid the company?

A. Yes, sir; every dollar of it.

Q. Where was this building being erected?

A. It is in the ten hundred block on Main Street; I don't remember the exact number of it,—1016 or 18.

Q. What was it known as,—what block?

A. It is the Tiner Block. It used to be the old Wheeler-Motter building.

Q. What is in there now?

A. The Manitou Hotel is above, and the Boz Theatre is in the lower story.

Q. Is that the place where the operations were performed that Mr. Sheppard solicited the insurance for?

A. That is the place where these operations were performed.

Q. Is that the location and the place where Mr. Irvin was working?

(Testimony of C. H. Lee.)

A. Yes, sir; that is the place on which he was working. Q. At the time of the accident?

ing.

Q. At the time of the accident?

A. At the time of the accident, and at all other times.

The COURT.—Did he state what this man was doing in fact?

Mr. FRASER.—I was just going to ask him that question.

Q. What was Mr. Irvin working at at the time of the accident? [33]

A. He was working with nine or ten other men, helping to move a steel girding, running it along to its place, to get hold of it with a derrick, to lift it up to its place in the story above; it was on the basement floor, where it was being handed.

Q. What steel work was there about that building to be constructed? What did it consist of,—the steel work,—where you had these men employed?

A. It consisted of putting into place either,—I think there were eight,—steel girders on top of that, partly resting on the columns, and one end resting on the walls. They are on the second floor, or the ceiling of the first floor.

Q. Did you have men there like machinists, running machinery there, or anything like that?

A. No.

Q. It wasn't a machine job was it?

A. No, just a plain piece of work; just lifting these girders up with a derrick and putting them in place.

(Testimony of C. H. Lee.)

Q. These men were classified in your payroll by you as steelmen, were they? A. Yes, sir.

Q. And you paid the premium called for in this policy on their wages? A. Yes, sir.

Q. Do you remember what day the accident happened down there? A. No, I don't remember.

(Judgment-roll marked Plaintiff's Exhibit No. 3.)

Mr. FRASER.—I offer in evidence judgment-roll in the case of J. C. Irvin vs. A. S. Whiteway & Co. [34]

Mr. Martin.—No objection.

(Said exhibit was thereupon marked "Admitted.")

Mr. FRASER.—This judgment-roll, if the Court please, contains the complaint in that action, setting forth that he was injured, against these parties, and the verdict of the jury, and the entering up of the judgment in that case giving the dates of it, which facts the defendant admits were shown thereby.

A certain check was thereupon marked Plaintiff's Exhibit No. 4.

Q. Now, Mr. Lee, calling your attention to Plaintiff's Exhibit No. 4, what is that?

A. That is a check for $5,000.00 that was issued in payment of this damage suit, payable to Alfred A. Fraser, our counsel.

Q. Was that check returned to you from the bank and paid?

A. Returned cancelled, yes sir, and our account was charged up with $5,000.00.

Mr. FRASER.—I would like to withdraw this witness for a few moments, and put on Mr. Paine, as he is in a hurry.

(Testimony of Karl Paine, for Plaintiff.)

KARL PAINE, a witness duly called and sworn on behalf of the plaintiff, testified as follows.

Direct Examination.

(By Mr. FRASER.)

Q. Mr. Paine, you reside in Boise? A. I do.

Q. And you are a practicing attorney at law?

A. Yes, sir.

Q. Were you one of the attorneys for the plaintiff in the case of J. C. Irvin vs. A. S. Whiteway and C. H. Lee, as [35] copartners, under the name of A. S. Whiteway & Company? A. I was.

Q. An action to recover damages for the plaintiff against them for injuries sustained in this city?

A. Yes.

(A certain check was thereupon marked Plaintiff's Exhibit No. 5.)

Q. Mr. Paine, I call your attention to Plaintiff's Exhibit No. 5. What is that?

A. That is a check for $5,000.00.

Q. From whom did you receive it?

A. From yourself.

Q. Did you cash it? A. I did.

Q. And get the money? A. I did.

Q. What was that paid to you for?

A. That was paid to me as a compromise settlement of the judgment obtained in the action referred to by you in your question here a moment ago.

Mr. FRASER.—Is there any objection to the introduction of that check?

Mr. MARTIN.—We object to it as being incompet-

(Testimony of Karl Paine.)

ent, irrelevant and immaterial, and not proving payment.

The COURT.—Overruled.

(Said Plaintiff's Exhibit No. 5, was thereupon marked "Admitted.")

Mr. MARTIN.—The policy says "Paid in money."

Mr. FRASER.—Well, I asked him if he received the money on that.

Q. Did you receive the cash on that?

A. I did [36]

Q. Did you receive it as attorney for the plaintiff J. C. Irvin? As his attorney? A. I did.

Q. And on his behalf? A. Yes.

Mr. FRASER.—That is all, Mr. Paine,

Cross-examination.

(By Mr. MARTIN.)

Q. What did you do with the money, Mr. Paine, that you received on that check?

Mr. FRASER.—I think that is immaterial, unless the Court desires to know. I haven't any objection to his stating what he did with it.

The COURT.—Of course it is immaterial unless counsel offer to show that it was a mere feigned payment, and was returned.

Mr. MARTIN.—That is the purpose of the question.

Mr. FRASER.—Well, you can ask him if he ever returned that to me or anybody else except the parties entitled to it.

The COURT.—Well, if that is true, you may ask him any question you want to. He may answer the

(Testimony of Karl Paine.)
question you asked him.

A. My recollection of it is that I sent for Mr. Irvin as soon as I received the check, and took a check-book with me, and went to Mr. Nugent's office. He was associated with me as attorney in the case, for the plaintiff; and I asked Mr. Nugent to deposit the check for me in the Pacific National Bank, and I then wrote a check for two-thirds of five thousand dollars, [37] gave it to Mr. Irvin, and a check for one-third of five thousand dollars, and gave it to Mr. Nugent, and the balance remained in the bank to my credit, as an attorney's fee.

The COURT.—Don't you mistate? You said two-thirds to Irvin and one-third to Nugent.

A. I should say one-sixth to Mr. Nugent, and retained one-sixth, as full compensation for myself.

Mr. MARTIN.—Q. So far as you know, has this money reached Mr. Irvin, that is, the money in cash, to be used by himself?

A. Mr. Irvin got two-thirds of five thousand dollars, on my check.

Q. That was for his own use and benefit?

A. It was, Mr. Martin.

Q. And retained by him?

A. And retained by him.

Q. And it was the same way with the other two-sixths you mentioned?

A. The other two-sixths, yes, Mr. Nugent and I divided one-third in accordance with an agreement that we had with Mr. Irvin.

Mr. MARTIN.—That is all at this time.

Mr. FRASER.—That is all, Mr. Paine. [38]

[Testimony of C. H. Lee, for Plaintiffs (Recalled).]

C. H. LEE, a witness heretofore duly sworn, upon being recalled, testified as follows, on further

Direct Examination.

(By Mr. FRASER.)

Q. In the action of Mr. Irvin against A. S. Whiteway & Lee, who was the attorney for Whiteway & Lee, in defending that suit, Mr. Lee?

A. Yourself, Mr. Fraser.

Q. What did it cost you for attorney's fees in defending that suit? A. $150.00.

Q. That is what you paid, but what was the agreed amount?

A. The agreed amount I think was $500.00.

Q. And you have paid how much of that?

A. $150.00.

Q. And the balance has not been paid yet by you to me? A. No, I haven't paid the balance.

Mr. FRASER.—That is all I desire to ask Mr. Lee at this time, Mr. Martin.

Cross-examination.

(By Mr. MARTIN.)

Q. I believe you said, Mr. Lee, that you didn't know Mr. Irvin?

A. I don't know him personally, I think; no.

Q. How do you know then what Mr. Irvin was doing when he was hurt?

A. Of my own knowledge, I don't know; I wasn't there; I didn't see him when he was hurt.

Q. Then that was hearsay that you testified to?

(Testimony of C. H. Lee.)

A. Yes, that part of it, that he was there working, —I didn't see him. [39]

Q. Did you have the payroll classified?

A. Yes, sir.

Q. According to instructions, as you say, that Mr. Sheppard gave? A. Yes, sir.

Q. When did you make that classification?

A. It was made by the foreman; the foreman on the job makes those classifications in the time-book.

Q. Did Mr. Sheppard tell you that they didn't have a rate for common laborers? A. No.

Q. Why was it that you didn't have him put in common laborers then, if you were so careful?

A. Because they were all included in the other classifications; didn't need any.

Q. When was it that you classified your payroll?

A. The foreman does that every day, in the time-book.

Q. That is, when a man went to work, he was classified right then and there by the foreman?

A. Yes. He puts them down, as to what they are doing, and at the end of the week he hands in the time-book to the office, and the man's name, and what he is doing, is in the time-book, and the rate they are paid. That is all done by the foreman, in the time-book. Then I make up my statements from that.

Q. Then from the time Irvin went to work you had him classified as a certain class of laborer?

A. Yes, as I understand it.

Q. Do you say you had him classified as a steel-man?

(Testimony of C. H. Lee.)

A. I wouldn't say that he was down on the job, written down in those words, steelman, but in the book, working on steel. [40]

Q. As a matter of fact, he was classified by your company as a common laborer, wasn't he?

A. No,—classified? He could be classified as a common laborer, probably; paying him laborer's wages.

Q. You say you were paying him laborer's wages?

A. Paying him laborer's wages, but his classification payment went right into the men on the steel classification, you understand.

(A certain accident report was marked Defendant's Exhibit No. 1.)

Q. Showing you Defendant's Exhibit No. 1, for identification, I will ask you if your company, A. S. Whiteway & Company, did not make out an accident report, in which you designated the occupation of Mr. J. C. Irvin as a common laborer.

A. I never saw this document; I couldn't give it any identification.

Q. Do you know Mr. A. S. Whiteway's signature?

A. Yes.

Q. Is that his signature?

A. That is his signature.

Q. And he is one of the partners of your company?

A. Yes.

Q. You never saw this?

A. I never saw that before, that I know of.

Mr. MARTIN.—I offer this at this time, as a part of the cross-examination of this witness, Defendant's Exhibit No. 1.

(Testimony of C. H. Lee.)

Mr. FRASER.—No objection.

(Said document was thereupon marked "Admitted.")

Mr. MARTIN.—Q. Then you do not know whether Mr. Irvin was moving steel, shoveling dirt, handling brick, wheeling [41] concrete, and doing most everything there was to do, around the basement of the Tiner Building, when he was injured?

A. I wasn't there when he was hurt; I didn't see him, what he was doing.

Q. Well, as a matter of fact, Mr. Lee, that work being done at the time Mr. Irvin was injured was in cleaning out the basement, was it not?

A. State that again, please. I didn't quite catch the idea.

Q. As a matter of fact, the work being done at the time Mr. Irvin was injured was in cleaning out the basement of the building, rather than the erection of steel?

A. No, mostly in the handling of steel, sir.

Q. Isn't it a fact that the actual erection of steel at the time Mr. Irvin was injured had not commenced?

A. No, that is not true at all; that is away off.

Q. And you know that?

A. I know that to be a fact, because I visited the building every day, sometimes after quitting hours, and sometimes at the noon hour.

Q. What steel was in place at the time Mr. Irvin was injured? A. What steel was in place?

Q. Yes.

(Testimony of C. H. Lee.)

A. I don't think I could give you a detail of what steel was in place when he was injured.

Q. What was the first steel put in place in that building?

A. Columns, after the girders on the first story; they would be placed first; after the columns were erected the girders would be put on top of them, in the natural order. [42]

Q. Those I-beams with which Mr. Irvin was injured were moved backward and forward several times in that basement, were they not, from one side of the basement to the other?

A. No, that would be silly. They would be simply moved once, to their place; then erected by the derrick and put up where they belonged. People don't move those things around just for fun, you know.

Q. Then you say they were moved but once, to put them in place?

A. They would be delivered first at the building by the draymen; then they would be run down into the basement; then they would be put up under the derrick, wherever that was going to be erected, in their position; that is the idea. They would first be unloaded in the alley by the draymen, from the cars; then they would be put into the building on the floor of the basement, to get them out of the way; you wouldn't leave them in the alley. Then when a girder is to be put in its place, a derrick is put where it is properly arranged to lift that girder in its place, and the beam is then run under the derrick and picked up and laid in its place. That is the

(Testimony of C. H. Lee.)
way it is handled always.

Q. Were you at the trial of Irvin vs. Whiteway & Company, in the District Court?

A. I think I was there about five or ten minutes one day; that it all.

Q. Were you present during that trial when Mr. Irvin testified? A. No.

Q. You signed and swore to a complaint in this action now being tried, did you not? [43]

A. I can tell you when I see it.

Q. I now show you what purports to be a copy, and I will ask you if that is your signature.

A. Is that my signature?

Q. Yes. A. No, that isn't my signature.

Mr. MARTIN.—Your Honor, may I have the original?

The COURT.—The original, of course, wouldn't be here; that would be in the State court.

Mr. FRASER.—That is a transcript brought here, Mr. Martin; the original here is just a transcript.

Mr. MARTIN.—Just mark this for identification.

(A certain document was thereupon marked Defendant's Exhibit No. 2.)

Q. Showing you Defendant's Exhibit No. 2, for Identification, I will ask you if you did not sign and swear to that complaint, before D. T. Miller, notary public? A. This signature here?

Q. Yes. A. That isn't my signature.

Q. No, that is the copy. I will ask you if you did not sign the original, and swear to it before D. T. Miller, notary public.

(Testimony of C. H. Lee.)

A. Well, sir, I couldn't say as to that. I don't recall it, I am sure. This isn't my signature though; I can testify to that. I wouldn't say, sir, from recollection, that I did sign that; I don't know whether I did or not; I couldn't say.

Mr. MARTIN.—That is all we care to ask this witness at this time, but we will ask to be permitted to show him the original complaint in this action [44] filed and removed to this Court, and ask for the privilege of further cross-examination at the time we can produce that original.

The COURT.—If the complaint is here purporting to be signed by him, the Court must assume that it is signed by him.

Mr. MARTIN.—Then we offer in evidence at this time Defendant's Exhibit No. 2.

Mr. FRASER.—I object to it.

Mr. MARTIN.—It is a copy.

Mr. FRASER.—I don't know whether it is a copy or not.

Mr. MARTIN.—It is your office copy, and I will show it to you.

Mr. FRASER.—And the witness I don't suppose knows. What is it you want to find out about this? I don't understand now.

Mr. MARTIN.—Well, we offer that in evidence. There is a certified copy here in the files, I believe.

The COURT.—Yes, this is a certified copy. State to counsel for what purpose you offer it.

Mr. MARTIN.—We offer this for the purpose of showing that Mr. Lee swore to this complaint, where

(Testimony of C. H. Lee.)
he alleges that J. C. Irvin was a common laborer.

Mr. FRASER.—It is in evidence, I presume, a part of the records and files in this case.

Mr. MARTIN.—We offer it in evidence, and ask that it be admitted.

The COURT.—Very well; it may be received.

(Said Defendant's Exhibit No. 2 was thereupon marked "Admitted.")

Which was the original complaint in this action, a true copy of which is set out heretofore in this transcript and made a part of this record. [45]

Mr. MARTIN.—Q. I will ask you, Mr. Lee, if you did not sign and swear to a complaint in which it was alleged that on the 25th day of July, 1910, and prior thereto, one J. C. Irvin was in the employ of the plaintiff as a common laborer, working for said plaintiff on the construction of a brick building between Tenth and Eleventh streets, on Main street, Boise, Idaho?

A. You ask me if I did swear to such a statement?

Q. Yes, sir.

A. I tell you I have no recollection of it. I couldn't say whether I did; I doubt very much if I was in the city at that time; I may have done so, but I couldn't positively say.

Mr. MARTIN.—That is all.

Redirect Examination.

(By Mr. FRASER.)

Q. When the complaint was drawn in this action that is now pending, in the district court, who was your attorney to draw up that complaint?

(Testimony of C. H. Lee.)

A. This action?

Q. Yes. A. You were.

Q. And you signed the complaint which I prepared for you, did you, in this action; signed and swore to a complaint which I prepared?

A. I think I did; I am not positive whether Mr. Whiteway or whether I did; I don't recall.

Q. In any event, it was your counsel who drew up this complaint for you? A. Yes, sir.

Q. The facts were stated to me,—the facts which you [46] stated to me, and by reason of being your counsel in the other case? A. Yes, sir.

Recross-examination.

(By Mr. MARTIN.)

Q. Did you state the facts to counsel on which he drew the complaint? A. I beg pardon?

Q. Did you give the facts to counsel upon which he drew the complaint? A. Did I give the facts?

Q. Yes. A. I think I assisted, yes, sir.

Mr. FRASER.—I offer in evidence Plaintiff's Exhibit No. 4, the check for $5,000.00 from Whiteway & Lee Construction Company to myself.

Mr. MARTIN.—No objection.

(Said Exhibit was thereupon marked "Admitted.")

Mr. FRASER.—That is all, Mr. Lee.

Mr. MARTIN.—That is all. [47]

[Testimony of Bradley Sheppard, for Plaintiffs.]

BRADLEY SHEPPARD, a witness duly called and sworn on behalf of the plaintiff, testified as follows, on

Direct Examination.

(By Mr. FRASER.)

Q. You reside in Boise, Mr. Sheppard?

A. I do.

Q. Were you the agent or representative in Boise during the year 1911 for the Pennsylvania Casualty Company?

A. I think I was. I wouldn't say when they stopped doing business here.

Q. Well, up until they stopped doing business?

A. Up until the time they stopped doing business, I was, yes.

(A certain letter was marked Plaintiff's Exhibit No. 6.)

Q. Calling your attention to Plaintiff's Exhibit No. 6, I will ask you if you prepared that document and sent it to A. S. Whiteway & Co.?

A. I assume that came from my office. I think that is all right. We send such a statement always.

Mr. FRASER.—I offer in evidence Plaintiff's Exhibit No. 6.

Mr. MARTIN.—No objection, Mr. Fraser.

(Said document was thereupon marked "Admitted.")

Mr. FRASER.—This is a letter from Mr. Sheppard, on the paper of the Pennsylvania Casualty Co.,

(Testimony of Bradley Sheppard.)

addressed to A. S. Whiteway & Co., Boise, Idaho.

(Reading exhibit.)

Q. Do you remember the incident of one J. C. Irvin receiving an injury in this town, Mr. Sheppard? A. I do. [48]

Q. Were you at the place of the accident shortly after the injury occurred? A. I was.

Q. Was Mr. Irvin still there when you got down there? A. No.

Q. He had been removed, had he? A. Yes.

Q. When did you make this investigation,—the same day as the accident?

A. I don't know exactly what you mean by investigation. I went there shortly after, and it was the same day as the accident, yes.

Q. It was the same day?

A. Yes. I don't know what you mean by investigation.

Q. Calling your attention to Defendant's Exhibit No. 1, did you ever see that document before?

A. Well, either this one or one just like it. I wouldn't swear to that signature on there.

Q. Well, what is your best judgment?

A. I judge this is the original one right here.

Q. Was that prepared on the usual blanks of the company for getting this information in cases of accident? A. Yes.

Q. And you prepared the blank?

A. No, they prepared the blank; they filled in this.

Q. Who filled it in?

A. Whiteway & Company.

(Testimony of Bradley Sheppard.)

Q. Do you mean all these blanks?

A. All this typewriting here.

Q. When was that done, the date it purports to be here? A. Yes. [49]

Q. Was it delivered to you by Whiteway & Company—this statement? A. Yes.

Q. What did you do with it?

A. Sent it on to the general agents of the company.

Q. Did you at any time after that have any conversation with Mr. Whiteway or Mr. Lee in regard to this accident?

A. With Mr. Whiteway I did, yes.

Q. Did you ever have any conversation with Mr. Irvin, the man that was injured? Did you go to see him? A. Yes.

Q. Did any other agents of the company come here to investigate this matter?

A. The adjuster of the company was here.

Q. The adjuster was here? A. Yes.

Q. Was that shortly after the accident?

A. No.

Q. It was some time after the accident? A. Yes.

Q. No adjustment was made, I understand?

A. No.

Q. What was the adjuster's name who was here, do you remember? A. John A. Coleman.

Mr. FRASER.—That is all at the present time.

Mr. MARTIN.—That is all. [50]

[Testimony of A. S. Whiteway, for Plaintiffs.]

A. S. WHITEWAY, a witness duly called and sworn on behalf of the plaintiffs, testified as follows, on

Direct Examination.

(By Mr. FRASER.)

Q. Where do you reside, Mr. Whiteway?

A. Boise.

Q. And you are one of the members of the firm of A. S. Whiteway & Company? A. Yes, sir.

Q. Are you acquainted with one J. C. Irvin?

A. Yes, sir.

Q. Do you remember the time that he received an accident in this town while he was working for your firm? A. Yes, sir.

Q. Whereabouts did that occur?

A. In the basement of the Tiner building.

Q. Between what streets?

A. Between Tenth and Eleventh.

Q. On Main? A. On Main Street.

Q. Do you remember what time of day it was, about the time of day?

A. It was between four and five o'clock in the afternoon.

Q. Had you seen Mr. Irvin during that day?

A. Yes, sir.

Q. What was he working at at this time?

A. He was working on the iron work.

Q. What do you classify it as?

A. He was under the pay-roll of iron workers.

Q. Iron or steel, or what is it?

(Testimony of A. S. Whiteway.)

A. Iron and steel, yes. **[51]**

Q. That is what he was at at the time of the accident? A. Yes.

Mr. FRASER.—That is all.

Cross-examination.

(By. Mr. MARTIN.)

Q. You were in the district court when Mr. Irvin testified, in the case that Mr. Irvin brought against Whiteway & Company, were you not?

A. Yes, sir.

Q. And you heard Mr. Irvin testify, did you not?

A. I think so.

Q. You heard him testify that he was a common laborer, did you not? A. I don't think so.

Q. Will you say he did not testify that he was working as a common laborer?

A. I will not say so, but I will say that he testified that he was an iron worker and machinist, I think, at that time. I think he testified that he was getting $4.50 or $5.00 as an iron man or machinist.

Q. While working for Whiteway & Company?

A. No; that was preceding working for us.

Q. Do you remember him testifying that he was getting $2.50 a day while working for you?

A. I think so.

Q. Do you remember that he testified that he was shoveling dirt, wheeling concrete, handling brick, moving steel, and doing most everything there was to do about there?

A. I don't remember classifying—I know he was moving steel at the time the— **[52]**

(Testimony of A. S. Whiteway.)

Q. Would you say he was not shoveling dirt, wheeling concrete, and handling brick?

A. No. I will say he wasn't handling brick at that time. If he swore to that testimony, he swore falsely, because there wasn't any brick to be handled in that building at that time.

Q. Will you say he didn't say he was wheeling concrete? A. No, I wouldn't say.

Q. Was he wheeling concrete there?

A. I don't know. I don't think so. He might have.

Q. Was he doing most everything there was to do around there? A. He was.

Q. Would you say he did not say that?

A. I would not.

Q. He might have sworn to that then?

A. He might have, yes.

Q. You did not deny in that court down there that Mr. Irvin was a common laborer, did you?

A. I don't think so; I don't think I was on the stand at all in that case.

Q. You heard him testify to that?

A. I don't know. I can't remember what he testified to at that time.

Q. How much of the time were you present down there while that work was going on?

A. I was down there practically all the time from the start till the accident occurred, and after, until the building was completed.

Q. How long had Irvin been working there?

A. I couldn't say—perhaps a week or ten days—

(Testimony of A. S. Whiteway.)
perhaps more. [53]

Q. What other work would you say he was engaged in, outside of the—

A. I don't say he was engaged in any other work outside of the steel work.

Q. Will you say he was on that work all the time he was in your employ? A. I think he was.

Q. Handling those steel beams?

A. He might have been sweeping the floor, in order to get the floor clean, to remove the beams, or some dirt, necessary to get a clear way to run the steel. He might have been taking a shovel occasionally and shoveling the dirt, so that he could move the steel, which a steelman would do, or anybody else, if he had to move steel.

(A certain transcript was marked Defendant's Exhibit No. 3.)

Q. Showing you Defendant's Exhibit No. 3, for identification, which purports to be the transcript of the reporter's notes, in the District Court, in the case of Irvin vs. Whiteway & Company, at page four, I will ask you if, while you were present and listening to Mr. Irvin's testimony, this question was not asked and answered in this form: "What was the nature of your work? A. Well, it consisted of moving steel, and shoveling dirt, and handling brick, wheeling concrete, and most everything there was to to do around there."

A. I couldn't answer that question. I don't know whether that question was asked and answered or not.

(Testimony of A. S. Whiteway.)

Q. Well, if that question was asked, was that true?

Mr. FRASER.—I object to that, asking him if it was.

The COURT.—He has already answered that it was [54] not true, in one respect at least.

A. It was not true in the brick work.

Mr. MARTIN.—Q. Was it true as to shoveling the dirt?

A. I don't know. He might have shoveled dirt, I say, in clearing for the steel, or something of that kind, which would come in a steelman's line; if there was any obstructions in the way he would move them.

Q. Was it true as to handling brick?

A. No, it wasn't.

Q. As to wheeling concrete?

A. I couldn't say; it might have been.

Q. Was it true as to doing most everything there was to do around there?

A. I don't know whether that question was asked or not. I know there was one item in there that is not true.

Mr. MARTIN.—We offer in evidence Defendant's Exhibit No. 3, as to page 4 of said exhibit, as part of the cross-examination of this witness.

Mr. FRASER.—We object to it as incompetent, irrelevant and immaterial, and the statements made by the witness Irvin in the other case would not be binding upon us in this case. He wasn't our witness, or anything of the kind. We might not desire

(Testimony of A. S. Whiteway.)

to cross-examine him in that suit, and we might desire to do so at this time. We are not bound by his statements.

The COURT.—Sustained.

Mr. MARTIN.—Q. Showing you Defendant's Exhibit No. 1, for identification, I will ask you if you signed that report?

A. That is my signature, yes, sir. [55]

Q. And did you turn that report over to Mr. Sheppard? A. As it is?

Q. Yes.

A. I wouldn't swear to that. When the accident occurred, I had blanks; I think the blanks were entirely different from this though; and it was made out, giving a report of the accident; but I wouldn't swear that I typewrote this copy. I know this is my signature. I signed it. But I wouldn't swear that I typewrote that. I know I made out a form, and I think it was written in longhand, and I think the company has an accident form to be submitted in forty-eight hours after the accident. I wouldn't be positive whether I wrote that.

Q. You admit, however, that you signed this report? A. Yes, sir.

Mr. MARTIN.—That is all.

Mr. FRASER.—That is all, Mr. Whiteway. That is all.

Mr. MARTIN.—Is that your case?

Mr. FRASER.—Yes.

Mr. MARTIN.—We will call Mr. Sheppard. [56]

[Testimony of Bradley Sheppard, for Defendant.]

BRADLEY SHEPPARD, a witness heretofore duly sworn in behalf of the plaintiff, upon being recalled as a witness for the defendant, testified as follows, on

Direct Examination.

(By Mr. MARTIN.)

Q. I believe you have already stated, Mr. Sheppard, that you were the agent for the Pennsylvania Casualty Company at the time this policy in question was taken out? A. I was.

Q. Just state the circumstances surrounding the entering into the contract between the Pennsylvania Casualty Company and Whiteway & Company, what you did as agent, and what Whiteway & Lee did.

A. I was called first by phone by someone from Whiteway & Lee's office, and asked to come over and figure on writing an employers' liability policy on some construction work they were about to do. I went over to Whiteway & Lee's office, and saw Mr. Lee, and was asked to give figures and rates for an employer's liability policy on a construction job known as the Tiner Building, which had been destroyed some time before that by fire. He gave me a list of people whom he wanted to cover, and I quoted him the prices of the different occupations, and a little later secured his consent to write the policy, which was done.

Q. Did you name the laborers that would be covered by this contract? A. I did not.

Q. Or did he name them? A. He did.

(Testimony of Bradley Sheppard.)

Q. Was there any discussion as to what these different [57] classifications covered?

A. No discussion about it.

Q. He simply gave you the names of the bricklayers, masons, etc.? A. Yes.

Q. What did you do with that list, or what did you do with those classifications he gave you?

A. I quoted him prices on them.

Q. And did he give you a classification of labor known as common laborer? A. No.

Q. Was there any conversation at that time concerning any of the classifications covering common laborers? A. I don't recall any; I think not.

Q. At that time did you have a rate for common laborers?

A. I think so. We are in the habit of issuing policies for common laborers.

Q. Did he ask you for a rate on common laborers?

A. He did not.

Q. Was there anything said about the classifications named by him as covering those engaged in common labor? A. Not that I recall.

Q. Did you know whether the schedule that he gave included all of the kinds of labor that he would have working on that building?

A. I couldn't say definitely about that; sometimes we cover everyone on the building; sometimes we do not. Much of the work at times is subcontracted, and we don't cover the subcontractors at times, and at times we do. I can't recall all the details as to that. [58]

(Testimony of Bradley Sheppard.)

Q. Then your recollection is that he gave you this list of laborers and classified them? A. Yes.

Q. And you took them as he gave them to you and put them in the policy? A. Yes.

Q. Were you covering plumbers in that policy?

A. I don't know. I wouldn't say whether they are classified there or not; I don't think they are. I don't remember the policy exactly.

(Mr. Martin handed policy to witness.)

A. No.

Q. Do you know whether there were any plumbers working for Whiteway & Lee there on that building? A. I do not.

Q. Was it your intention to cover just the class of laborers given in that schedule? A. Yes.

Q. Now you had a rate, did you, for common laborers? A. Yes.

Q. Did you also have a rate for steelmen?

A. Yes.

Q. Was there any difference in the rate for common laborers and the rate for steelmen? A. Yes.

Q. Do you remember what the rate for common laborers was? A. Mostly $1.50.

Q. And this rate you gave on steelmen I believe was $6.50?

A. I do not remember—whatever it shows in the policy there. **[59]**

Q. Now, after Irvin was injured, did you receive any notice of the injury, as agent for the company?

A. Yes.

Q. That was the report of the accident?

(Testimony of Bradley Sheppard.)

A. Yes.

Q. Showing you Defendant's Exhibit No. 1, I will ask you if that is the report that you received?

A. That is the same thing I had before.

Q. Is that in the same form that it was at the time you received it, as near as you know? A. Yes.

Q. This report you sent on to the main office of the company? A. The general agents.

Q. Showing you Plaintiff's Exhibit No. 1, the insurance policy in question, I will ask you where you get your information, or from what source you put in the words on the typewriter, "No exception," after statement 6?

A. That is a copy of the application for the policy given at the time of the application, generally.

Q. And who makes out the application?

A. Generally the agent does. He asks those questions.

Q. In this instance, do you know who did?

A. I think I did.

Q. Who furnished you the information from which you filled out the blanks in the application?

A. Mr. Lee.

Q. Then after the application is filled in, from information received, as you say, from the person asking the insurance, you make out what is termed here the declarations, on page 3, from that application? [60]

A. The application goes to the general agent. I do not issue those policies. The general agent or the home office issue an employer's liability policy.

(Testimony of Bradley Sheppard.)

No local agent I have ever known of issues that policy. The application is sent to the general agent. The application covers what is desired in the policy, and the policy is made according to the statements of that application. Then the policy is sent back to the resident agent, who in turn countersigns the policy, as he may wish or not, and delivered to the assured.

Q. Well, these words "No exception," after statement 6, and statement 7, or statement 8, statement 9, statement 10, statement 11, on the third page of this Plaintiff's Exhibit 1, are placed in there from information received on the application made out by the insured, is that right?

A. That is the way it is always done.

Mr. MARTIN.—That is all.

Cross-examination.

(By Mr. FRASER.)

Q. Have you issued a good many policies of this character, Mr. Sheppard? A. A great many.

Q. You have written a great number of them?

A. Yes.

Q. Is it a common thing for contractors to require these insurance policies, or procure them, rather?

A. Yes.

Q. When they make application to you, do you go down and look over the location of their work, or pay any attention to what their work is going to be?

[61]

A. Generally speaking, not.

Q. Now, under the term of "Plasterers" here, it

(Testimony of Bradley Sheppard.)
says, "Estimated number five to ten, wages $800.00, and rate $1.20." Under that classification there, would that include a hod-carrier for the plasterer, or would it be just the fellow that would put on the mortar?

A. My version of it would be the plasterer himself.

Q. You think nobody but them. Well, about the bricklayers and masons, would that cover anybody but just the men that were putting the brick on the wall? Is that the way you construe that, that nobody is insured except just the one man?

A. Possibly I can explain that in another way. We consider masons and their helpers only masons.

Q. Wouldn't you require them to pay the premium on their pay-roll of these other men, as well as the fellow who laid the brick on the wall, Mr. Sheppard?

A. Not if that classification were not mentioned in there.

Q. Do you mean to say now that in all these policies you have drawn up for these men that you gave them the understanding that the men upon whom they were paying premiums, and were insured, and then when an accident happened that only a certain number of them were insured, after you had taken the premium on the others?

A. Well, as to the premium feature, you may be sure they are not going to pay the premium only on the estimated compensation, as shown in the policy. Now, it is a very usual thing to cover a contractor,

(Testimony of Bradley Sheppard.)

and cover only a very few of his men.

Q. That is when he asks for that kind of a contract? A. Yes. **[62]**

Q. But when he is putting up a building, and asks for a contract of classification, such as here, which evidently intends to take in at least to a certain extent the men that are employed in the different departments, for instance, such as steelmen,—do you know what the steelmen did in these buildings?

A. I know what our accepted idea of them is.

Q. Now, your premium on steelmen, as I understand, is about the highest premium you have got?

A. Yes.

Q. What do you recognize as a steelman, then,—men that handle these girders, work with the steel that goes into the construction of a building?

A. Well, I recognize that that is the point at issue, and I am not going to say that I can establish what a steelman is for you.

Q. Now, common laborers, you say you have a classification for common laborers. The rate on their wages is a good deal less than it is on this steel classification, isn't it? A. Yes.

Q. Now, do you remember of writing any of these policies for the contractors that were putting up these buildings, such as this was, and then having a classification in addition to these of common laborers? A. Oh, yes.

Q. Sometimes that has been done? A. Oh, yes.

Q. Now, would a brick layer be a common laborer?

A. No.

(Testimony of Bradley Sheppard.)

Q. Plasterer? A. No. [63]

Q. Hod-carriers?

A. That is a question I don't know—

Q. Well, then, it is pretty hard to tell, isn't it, Mr. Sheppard, what is included in these general classifications?

A. It is a good deal up to the contractor at times.

Q. You wouldn't know, you say—there is no plumber mentioned in here,—you don't know whether Whiteway & Lee had the contract for putting any plumbing or heating in that building, do you? A. No.

Q. If they didn't have such a contract they wouldn't want to insure any plumbers, would they?

A. No.

Mr. FRASER.—That's all.

The COURT.—I think I will ask one question. You may object, either side, if you desire.

Q. Suppose it were frankly stated to you, Mr. Sheppard, that a man was to be employed in moving steel girders and beams, and erecting them, would you write a policy upon a man of that kind for the common labor rate, or would you exact a higher rate?

A. I would exact a higher rate.

Mr. FRASER.—I have no objections.

(A certain policy was thereupon marked Defendant's Exhibit No. 4.)

Redirect Examination.

(By Mr. MARTIN.)

Q. Showing you Defendant's Exhibit No. 4, Mr. Sheppard, I will ask you to state what that is?

(Testimony of Bradley Sheppard.)

A. Liability policy issued to Fred G. Mock.

Q. In that policy you had a common laborer classification? [64] A. Yes.

Q. And gave the common laborer classification and rate? A. Yes.

Q. Of how much? A. $1.50.

Mr. MARTIN.—We offer this in evidence as part of the redirect examination of this witness.

Mr. FRASER.—It is objected to as incompetent, irrelevant and immaterial. It is a policy that he wrote for somebody else. He stated that he had a classification for common laborers, and that it was issued in the policy sometimes.

The COURT.—Sustained.

Mr. MARTIN.—Q. If you knew a lot of common laborers were to be used in handling and erecting heavy steel, what would be the action of the company, if it were made known to them?

Mr. FRASER.—I object to that as incompetent, irrelevant and immaterial.

Q. What would you do before issuing the policy?

Mr. FRASER.—I object to that as immaterial.

The COURT.—It don't seem to me that that comes within any showing in the record at present; that is, there is no showing here that common laborers were used in erecting steel, a lot of common laborers used for erecting steel, in this particular case.

Mr. MARTIN.—That is all.

Mr. FRASER.—That is all. [65]

[Testimony of J. C. Irvin, for Defendant.]

J. C. IRVIN, a witness duly called and sworn on behalf of the defendant, testified as follows, on

Direct Examination.

(By Mr. MARTIN.)

Q. You may state your name.

A. J. C. Irvin.

Q. Where do you reside, Mr. Irvin. A. Boise.

Q. Were you in the employ of Whiteway & Lee in July, 1910? A. Yes, sir.

Q. What was the nature of your work?

A. Well, it consisted of anything there was to do, such as handling steel and concrete, dirt, brick, or anything there was there to do.

Q. Were you working at your trade for them?

A. No, sir.

Q. What were you working at for them?

A. I just got through telling you it was steel work, or anything they had to do, steel work, brick work, concrete, or anything they told me to do.

Q. Were you working for Whiteway & Lee as a common laborer?

A. Drawing common laborer's wages.

Mr. FRASER.—I object to that. He just told the Court what he was doing. It is a conclusion of the witness; that would be a conclusion. Let him tell the facts, which he has stated, what he was doing.

The COURT.—Yes, I think so. I don't know just what is in counsel's mind, when he says "common laborer." I have an impression what that means.

(Testimony of J. C. Irvin.)

When a man says he is a common laborer I have some sort [66] of an idea as to what is meant.

Mr. MARTIN.—Q. Did you furnish any tools?

A. No, sir.

Q. Just working with your hands?

A. And what tools they furnished.

Q. What salary did you receive, or pay?

A. $2.50.

Mr. FRASER.—That is immaterial. There is nothing in the policy that requires them to pay a steelman any particular salary. There is a condition that they must pay a premium on the salary they do pay.

The COURT.—I shall let him answer. Did you answer the question? A. Yes, sir.

Mr. MARTIN.—Q. Had you had any experience in handling steel?

Mr. FRASER.—That is objected to for the reason that there is no qualification laid down in the provisions of this policy that a man has to possess certain qualifications to work at any of these particular trades.

The COURT.—He may answer. The objection is overruled.

A. Not in that line of steel.

Q. As I understand it, you were a machinist by trade? A. Yes, sir.

Q. Had you ever had any experience in handling steel girders? A. No.

Q. Did you work with a wheel barrow part of the time, wheeling concrete? [67]

(Testimony of J. C. Irvin.)

to the same thing. [69]

Q. I will ask you this question: If you did not answer to this question, "Were you working at your trade for them?" and your answer was, "No, sir, I was working as a common laborer."

Mr. FRASER.—I object to that as calling for the conclusion of the witness. He may ask this witness the question. I object to him reading that testimony, and asking the witness to say whether he testified to it.

The COURT.—Sustained.

Mr. MARTIN.—Is it sustained, your Honor, on the ground of asking for a conclusion of this witness?

The COURT.—It isn't important what he testified to in the other case, unless it tends to impeach him. If he stated the specific facts here, it appears to be common labor. The witness appears to be frank here; and that may be enough for the Court.

Q. Did you receive the payment of your part of the judgment? A. Yes, sir.

Q. Or your part of the payment, the judgment you received in the case in the lower court?

A. Yes, sir.

Q. And you received that for your own use and benefit, and did not turn it back to the company in any way?

A. I received it for my own use. I didn't turn it back.

Q. What part of that judgment did you receive?

A. What part of it?

(Testimony of J. C. Irvin.)

Q. Yes. A. I received $3,333.33.

Q. Where did you put that money you received? [70]

Mr. FRASER.—I object to that as immaterial and irrelevant and incompetent.

Mr. MARTIN.—We are denying the payment, your Honor, and while it does seem as if we have traced this payment to quite a considerable length, we would like to ask this one further question.

The COURT.—Very well.

A. In the Idaho National Bank.

Q. To your own account? A. Yes, sir.

Mr. MARTIN.—That is all.

Cross-examination.

(By Mr. FRASER.)

Q. Mr. Irvin, the only steel work that was going on in the construction of that building was what you would term structural steel work, was it?

A. Sir?

Q. The only steel work that was going on there in the erection of that building was what you would term structural steel work? A. Yes, sir.

Q. You were working at the time of the accident with seven or eight other men, engaged in that structural steel work? A. Yes, sir.

Q. Doing the same class of work they were doing?

A. Yes, sir.

Mr. FRASER.—That is all. [71]

Redirect Examination.

(By Mr. MARTIN.)

Q. Do you belong to the structural steel worker's

(Testimony of J. C. Irvin.)

union? A. No, sir.

Q. Did you ever have any experience in handling structural steel? A. No, sir.

Mr. MARTIN.—That is all.

Recross-examination.

(By Mr. FRASER.)

Q. Do you know whether there is a structual steel worker's union here or not? A. I do not.

Mr. FRASER.—That is all.

Mr. MARTIN.—We will call Mr. Whiteway.

[Testimony of A. S. Whiteway, for Defendant.]

A. S. WHITEWAY, a witness heretofore duly called and sworn on behalf of the plaintiff, upon being recalled in behalf of the defendant, testified as follows, on

Direct Examination.

(By Mr. MARTIN.)

(A certain report was marked Defendant's Exhibit No. 5.)

Q. Showing you Defendant's Exhibit No. 5, for identification, I will ask you if you signed that waiver? A. Yes, sir, I signed that.

Mr. MARTIN.—We offer this in evidence, your Honor, as Defendant's Exhibit No. 5.

Mr. FRASER.—We object to it, if the Court please, as incompetent, irrelevant and immaterial, and it doesn't tend to disprove any allegation in [72] this complaint. You might state shortly to the Court what that is.

Mr. MARTIN.—That is the waiver. The waiver

(Testimony of A. S. Whiteway.)

is what we are offering it for, your Honor.

The COURT.—Well, it may go in. I don't know whether it is very material or not.

(Said Defendant's Exhibit No. 5, was thereupon marked "Admitted.")

Q. You signed this instrument, Defendant's Exhibit No. 5, in the office of Karl Paine, did you not?

A. Yes, sir.

Q. And Karl Paine was at that time the attorney for J. C. Irvin, was he not? A. Yes, sir.

Q. Mr. Whiteway, you also told another attorney in Boise to go and see Mr. Irvin, to get his case, did you not?

Mr. FRASER.—I object to it as incompetent, irrelevant and immaterial. I don't see what it has got to do with this case.

The COURT.—Is the matter pleaded?

Mr. MARTIN.—Yes, your Honor.

Mr. FRASER.—Even if he did, it don't affect the right to recover under this policy. There is no provision or term in this policy that that constitutes any forfeiture, or anything of that kind, and if a man got injured I think he would have a right to tell him to hire an attorney.

The COURT.—He may answer.

(Last question read.)

A. I didn't solicit the attorney in order to do that. I was called to Mr. Irvin's residence over the phone, and I went [73] out there, and he wanted some money to pay his rent. It was after he got home from the hospital, and he had no work for the time

(Testimony of A. S. Whiteway.)
he was tied up in the hospital, and didn't have any money, and it was at that time that I loaned Mr. Irvin,—I don't know how much—sixty or seventy-five dollars, on a note; I took his wife's note for it. And during the time I was there this conversation came up, and he said he was going to have an attorney represent him, and I recommended Frank Kinyon. Frank Kinyon went out there and saw him, I think, and he wouldn't have Frank Kinyon, and went to these other attorneys, and which I didn't have anything to do about.

Q. You told Frank Kinyon on the corner of Ninth and Idaho streets?

A. I met him somewhere; I don't know where. I told him that Irvin wanted an attorney, yes, sir.

Q. And at that time you had in your possession the insurance policy, which provided that you should lend at all times to the company all the co-operation and assistance in your power?

A. I don't know that I did.

Q. Don't you know that you contracted that, that you were to render to the company all the co-operation and assistance in your power?

A. I did, yes, but that wasn't against the company; I didn't do anything against the company.

Q. You also signed this statement, waiving the statutory notice, in the office of the attorney for Irvin, did you not? A. I signed that waiver, yes.

Q. Is it also true that you didn't know you were injuring the company then?

A. That I didn't know? No, I didn't think I was

(Testimony of A. S. Whiteway.)

injuring the company. [74]

Q. Did you think that you were—

A. It was simply—I signed it, with the understanding that it was simply showing how the accident occurred.

Q. Who did you get the understanding from?

A. From the attorneys. Q. Which attorney's?

A. Paine. Q. And who else?

A. That is all that I know, Karl Paine. I didn't understand that I was signing any rights of the company away.

Q. Did you read that when you signed it?

A. I don't know whether I did or not. I don't remember that. I remember signing it.

Q. Didn't you turn over this policy to Frank Kinyon also at the time you told him to go out there?

A. No, sir, I didn't have the policy in my possession.

Q. You have always had it in your possession?

A. I didn't have it. I never saw the policy. Mr. Lee had control of the policy at all times, in the office, and I never saw those policies until this accident came up.

Q. And you don't know whether Mr. Lee turned it over to Mr. Kinyon or not? A. I do not, no, sir.

Q. Do you know whether Mr. Lee turned this policy over to Mr. Karl Paine or not?

A. I do not. Mr. Lee's testimony would be best on that matter.

Mr. MARTIN.—That is all. [75]

(Testimony of A. S. Whiteway.)

Cross-examination.

(By Mr. FRASER.)

Q. This Defendant's Exhibit No. 5, who was it requested you to accept service of this?

A. Karl Paine.

Q. Mr. Paine, in his office? A. Yes, sir.

Q. You just accepted service of this notice of the accident? A. Yes, sir, that is all.

Redirect Examination.

(By Mr. MARTIN.)

Q. Were you up there in Paine's office concerning this injury to Irvin?

A. No. Mr. Paine called me up there to sign this notice, and I went up and signed it. I understood at the time it was signed that they were going to settle, and they wanted that data in order to settle with the bonding company.

Q. And you don't know whether you read that or not?

A. I don't know whether I did or not; I presume I did, or else I wouldn't sign it.

Q. And that understanding you just mentioned concerning the settlement, I suppose you also got that from Mr. Paine, did you?

A. I understood the company was going to settle and they wanted my release there; they were going to compromise this settlement with Mr. Irvin.

Mr. MARTIN.—That is all. **[76]**

[Testimony of A. A. Fraser, for Defendant.]

A. A. FRASER, duly called and sworn as a witness for the defendant, testified as follows, on

Direct Examination.

(By Mr. MARTIN.)

Q. Mr. Fraser, you were the attorney for Whiteway & Company in the cause of action brought by Mr. Irvin against Whiteway & Company, your clients, were you not? A. I was.

Q. And you drew and prepared the answer of Whiteway & Company in that case, did you not?

A. Yes, I did.

Q. Did you not admit in that answer that J. C. Irvin was a common laborer?

A. Well, I don't remember, Mr. Martin. I think now,—I know that he was called a common laborer in the complaint, and in drawing the complaint in this action I had those files, and I drew the first complaint in this action and called Mr. Irvin a common laborer. I afterwards discovered, some time later in fact, looking over the complaint, and saw where he was called a common laborer, and I asked to amend by changing it to steelman. It is probable that in the answer it wasn't denied, because in that case we wasn't particular what we called him.

Q. There was no particular reason why you shouldn't call him what was true?

A. In that case he was entitled to recover from Mr. Whiteway whether a common laborer or steel man, so there was no necessity for disputing what he was, in the case of Irvin V. Whiteway, and the complaint

(Testimony of A. A. Fraser.)

called him that, and I presume I left it that way, without denying it. [77]

Q. Well, I will show you the answer.

A. I drew the answer.

Q. And I will ask you if, anywhere in that answer, there is a denial of the allegation that Mr. Irvin was a common laborer?

A. Well, I don't want to take the time to read it over. If it isn't in here it isn't,—unless you want me to take the time. I will look at the complaint,—allegation three of the complaint,—and in the answer—I notice the answer admits paragraph three of the complaint. It doesn't deny any part of that. The answer says nothing about it. It admits it by failing to deny.

Q. You are also the attorney for Whiteway & Company in this present action, and you prepared the complaint of Whiteway & Company, did you not?

A. In this action? Q. Yes.

A. Yes, sir, I did.

Q. Who furnished you the facts upon which you drew the complaint in this action?

A. I was familiar with the facts, by reason of going through the other action. The policy was turned over to me, and I had the policy in my possession, and office copies of the pleadings and judgment in the action of Irvin v. Whiteway.

Q. I suppose you had also talked to your clients, Mr. Whiteway and Mr. Lee, concerning this?

A. I don't know that I had at the time I drew this answer. I talked to them during the trial, and prior

(Testimony of A. A. Fraser.)

to the trial of the other case.

Q. Well, upon such information as you acquired, you drew the complaint, and alleged that Mr. J. C. Irvin was a common laborer? [78]

A. Yes, the original complaint had that allegation.

Q. And that complaint stood as your pleading in this court until the 24th day of September, 1912?

A. I don't remember the date—somewhere about there.

Q. And on that date you asked the attorneys for the defendant to allow you to amend that complaint by striking from the complaint the words "common laborer" and substituting therefor the words "steelman, whose entire compensation is included in the estimated compensation as shown in statement three of the declarations of said policy."

A. Yes, there was a stipulation to that effect signed by attorneys for both sides.

Q. At that time who furnished you the information upon which you desired to change your complaint from a common laborer to a steelman?

A. The case was about at issue, and about to be tried at that term of court, and in getting out the files I took out the complaint, and also the policy, and in looking it over I discovered that common laborer wasn't designated as a separate classification in that policy, and I therefore desired to change that to steelman, as the evidence showed that he was working on the steel. I discovered it in the other trial. I wanted to plead according to the facts, that the man was working on the steel when he was injured, as the

(Testimony of A. A. Fraser.)

evidence showed in the other case, and I discovered it myself.

Q. You say you discovered the facts from an inspection of the policy along about that time?

A. In getting out the pleadings and the policy, and the complaint and answer, and going over the complaint and policy, I discovered that common laborer wasn't placed in a classification by itself in the policy, and therefore I desired to make the change. [79]

Q. You discovered that it wouldn't do for that allegation to stand in the complaint, that he was a common laborer?

A. I didn't know whether it would or not, but I desired to bring it within the terms of the work the man was working at.

Q. And in order to do that you wanted to change the allegation from the allegation as it stood, that he was a common laborer, to the allegation as you thought it would be covered by the policy, and make him a steelman?

A. I don't know as to that. He might be a common laborer and working on the steel, or a steelman might be a common laborer, as far as I know. I told you there was no classification of common laborer. They had called him that in the other suit, and I had drawn the pleadings in this case from the old pleadings in the other case, without taking any particular notice of the policy at that time, or its terms or conditions.

Q. And Mr. Lee, I think it was, that swore to that complaint?

(Testimony of W. L. Hammond.)

A. Yes; when the complaint was drawn I telephoned to Mr. Lee to come over and sign it.

Mr. MARTIN.—That is all. [80]

[Testimony of W. L. Hammond, for Defendant.]

W. L. HAMMOND, a witness duly called and sworn on behalf of the defendant, testified as follows, on

Direct Examination.

(By Mr. MARTIN.)

Q. What is your full name?

A. W. L. Hammond.

Q. Where do you reside? A. Boise, Idaho.

Q. What is your occupation?

A. Building inspector.

Q. Building inspector of the city?

A. Of the City of Boise.

Q. Have you had experience in construction of buildings? A. Yes, sir.

Q. And building trade or business? A. Yes, sir.

Q. Over how long a time does that experience of yours extend? A. About fourteen years.

Q. And do you know what the term "common laborer," as used in the building trade or business, and the term "steelman," as used in that trade or business, is?

A. I will say that that is quite a broad question, but in the line of steel work or steel worker, in this country, I haven't had experience. I am not quite positive just what to say, but in the east, where I came from,—Indiana—

Mr. FRASER.—I object to that, if the Court

(Testimony of W. L. Hammond.)
please, as incompetent, irrelevant and immaterial, what they are in the east; and second, the policy requires no conditions or qualifications in regard [81] to a man working in these different classifications, but the only condition is that he pay the higher rate of premium, according to the work he is at.

The COURT.—The objection is sustained, as to what he was going to say about the east.

Q. I will ask you this, Mr. Hammond: Where a firm of contractors was engaged in the construction of a certain building, a four-story brick building, in Boise, and had in their employ a man the nature of whose work consisted in moving steel, shoveling dirt, handling brick, wheeling concrete, and in doing most everything there was to do around the building, and whose wages were $2.50 per day, would you say this man was working at that time for those contractors in the capacity of a steelman or in the capacity of a common laborer?

Mr. FRASER.—I object to that as calling for the conclusion of the witness, and immaterial and irrelevant.

The COURT.—I think I shall let him answer. I don't know how much value it will have, or whether the witness could intelligently answer that question without knowing more about it perhaps.

Mr. MARTIN.—You may answer.

A. I would class that kind of a man as a general utility man. If you want to know, in my own ideas and my experience, what a steelman is, or a steel worker, I can tell you.

(Testimony of W. L. Hammond.)

Mr. FRASER.—I object, as the witness hasn't shown himself qualified to testify to that.

The COURT.—Well, ask your next question. There is nothing before the Court.

Q. Would you call that man a common laborer or a steelman? [82]

The COURT.—Well, he has answered that he would call him a general utility man. Perhaps he wouldn't call him either a steelman or a common laborer.

Q. Would you call him a steelman?

A. A steelman can be turned either shifting steel—

The COURT.—Either what?

A. Erecting, in the erection of steel, or shifting steel on the ground or in the air.

Q. Was this man that I have described here in this question, as moving steel, shoveling dirt, handling brick, wheeling concrete, and in doing most everything there was to do around the building, whose wages were $2.50 per day, a steelman?

Mr. FRASER.—I object to that as incompetent, irrelevant and immaterial. The witness has already answered the question.

The COURT.—I think the responsibility of answering that question the Court will have to assume. It is a mixed question, perhaps.

Mr. MARTIN.—We are perfectly willing that the Court should answer that question, but we are offering this for the purpose of giving such light on the question of what is a common laborer or steelman as we think might possibly be of use to the Court.

(Testimony of W. L. Hammond.)

The COURT.—I understand the purpose, and this question is pretty near the line, but it seems to me that you are asking, not exactly an expert question, but a conclusion of law. You are practically asking whether this man, under these particular circumstances, should be called a steelman in this contract. Suppose, for instance, that a skilled steel workman, [83] one whose trade and qualifications were undisputed, were employed in the building, in a building of this kind, and he worked there six days, and in those six days he worked an hour moving brick, and an hour shoveling dirt, or in transferring concrete from one part of the building to another an hour, and the balance of the time was put in in erecting and moving steel, and he only got $2.50 a day, that might present an entirely different picture to a witness' mind, than some other condition put before him.

Mr. MARTIN.—I will add this to the information set forth in that question:

Q. (Continued.) Also taking into consideration the fact, as shown here also in the evidence, that this man was a machinist by trade.

The COURT.—I think I will let you go this far, and that is about as far as you can go, as to what a steelman is in his understanding, and what the duties of a steelman are, what line of work he does, what is a steelman, what does he do, when he is working as a steelman. You may ask him that question, if you desire to.

Mr. FRASER.—I think the witness has answered that question.

(Testimony of Frank H. Paradise.)

The COURT.—Possibly he has, but I am not sure that counsel feels that he has answered it fully enough. You can pursue that to any reasonable length.

Mr. MARTIN.—Well, we are satisfied with the hypothetical question. That is all, Mr. Hammond.

Mr. FRAZER.—That is all, Mr. Hammond.

Mr. MARTIN.—If your Honor please, we have about [84] four building contractor witnesses, and one of them isn't here at the present time, and if we could adjourn until Monday morning we would appreciate it. We could get these four here at that time, and not have to telephone for Mr. Dean.

The COURT.—Can't you put those that are here on now?

Mr. MARTIN.—Yes, we can, your Honor.

The COURT.—And, if necessary, I will leave the case open until Monday morning.

[Testimony of Frank H. Paradise, for Defendant.]

FRANK H. PARADISE, a witness duly called and sworn in behalf of the defendant, testified as follows, on

Direct Examination.

(By Mr. MARTIN.)

Q. State your name.

A. Frank H. Paradise.

Q. Your residence and occupation and profession.

A. Boise, Idaho, and I practice the profession of architecture.

Q. How long have you been practicing the profes-

(Testimony of Frank H. Paradise.)
sion of architecture? A. About eight years.

Q. Are you acquainted with the definition or meaning of the term steelman, as used in the building trade or business? A. I am.

Q. Are you also acquainted with the term "common laborer," as usually described in the classification of labor, in the building trades business?

A. I am. [85]

Q. Will you please define what a steelman is, in a building?

Mr. FRASER.—I object as incompetent, irrelevant and immaterial. The witness hasn't shown himself qualified to answer. The fact that he is an architect is not sufficient foundation.

The COURT.—Overruled. Answer the question, Mr. Paradise.

A. State the question again.

The COURT.—What is a steelman, as you understand it?

A. I couldn't answer about a steelman. I could tell you about a structural steelman, but I couldn't answer the question as to a steelman.

Q. You do not know, then, what a steelman is in the building trade?

A. Not under that term, I do not.

Q. Do you know what a common laborer is?

A. I do.

Q. What are the marks by which you can distinguish a man as a common laborer in the building trades profession?

Mr. FRASER.—I object to it as incompetent, ir-

(Testimony of Frank H. Paradise.)

relevant and immaterial, and calling for the conclusion of the witness.

The COURT.—He may answer.

A. A common laborer is a man that works around a building as a general utility man, does all kinds of menial labor.

Q. Does he usually furnish any of his own tools?

A. He does not. [86]

Q. Where a firm of contractors was engaged in the construction of a four-story brick building, in Boise, Idaho, in July, 1910, and they had in their employ a man that had been working for them about six days, a machinist by trade, who was engaged during those six days in moving steel I-beams, and shoveling dirt, and wheeling concrete, handing brick, and doing most everything there was to do around the building, what would you say that man would be classified as?

Mr. FRASER.—I object as incompetent, irrelevant and immaterial, and calling for the conclusion of the witness.

The COURT.—Sustained.

Mr. MARTIN.—That is all.

Cross-examination.

(By Mr. FRASER.)

Q. Mr. Paradise, in the erection of buildings such as he stated, a four-story building in this city, do they employ steelmen, or structural steelmen?

A. Structural steelmen.

Q. You don't know of such a thing as a steelman being employed in that particular trade?

A. No, I do not.

(Testimony of O. W. Allen.)

Mr. FRASER.—That is all.

Mr. MARTIN.—That is all. [87]

[Testimony of O. W. Allen, for Defendant.]

O. W. ALLEN, a witness duly called and sworn in behalf of the defendant, testified as follows, on

Direct Examination.

(By Mr. MARTIN.)

Q. What is your name? A. O. W. Allen.

Q. Where do you reside? A. Boise.

Q. What is your business?

A. General contractor.

Q. How long have you been a general contractor, Mr. Allen?

A. About four years, or four and a half.

Q. You are chiefly engaged in the construction of buildings and houses?

A. Residence work almost wholly.

Q. Are you also acquainted with the construction of buildings where steel has been or is used in the construction?

A. It is seldom I have to do with that, only in a very light form, unless it be in the case of some brick veneer or something like that.

Q. During your experience as a contractor, do you know what the generally accepted definition of the term common laborer and steelman is?

Mr. FRASER.—I object to it as incompetent, irrelevant and immaterial, and calling for the conclusion of the witness, and the witness hasn't shown himself qualified to answer.

(Testimony of O. W. Allen.)

The COURT.—He is asking whether he knows. You may answer. Do you know what those terms mean?

A. I don't know what the terms mean, no, steelman, [88] from the fact that I don't have anything to do with that line, don't figure in that line.

Q. Do you know what a common laborer is?

A. I know what I consider a common laborer, yes, sir.

Q. What is a common laborer?

A. Well, sir, a common laborer is—for me—I would expect him to do whatever I told him, in any line of work, I wouldn't expect him to furnish tools. I would expect him to do whatever I told him.

Q. Is that one of the marks of a common laborer, that he will do almost everything there is to do around a building?

A. Well, I would consider it so, yes, if a man was working for me.

Mr. MARTIN.—That is all.

Mr. FRASER.—That is all.

The COURT.—Let me ask you one question. Suppose you told a common laborer to plaster, would you expect him to do it?

A. I wouldn't expect him to do anything he couldn't do, no.

Q. Suppose he could do it.

A. Well, take my craftsmen, my carpenters, for instance, I quite frequently have them help in the concrete work.

Q. Well, do you call them common laborers be-

(Testimony of O. W. Allen.)
cause they help in that work?

A. No, I don't.

Q. I want to get at just what you mean by saying that you would expect him to do anything you asked him to do.

A. In the helper line. I would expect him to help the carpenters, or work on the mixing board, or concrete, or grade a lawn, or anything I asked him to. [89]

Q. You would expect him to do any unskilled labor? A. That's the idea.

Mr. MARTIN.—We have one more witness along the same line, and that will be our case.

The COURT.—There is one matter that I am a little in doubt about, and I will ask you now,—whether or not Mr. Lee testified that in paying the premiums upon the policy they were paid upon the basis of the inclusion of Irvin's wages, not wages paid to steelmen?

Mr. FRASER.—Yes, he so testified; at least that is my recollection of his testimony.

The COURT.—Well, I want to be sure, as to whether or not that is the case. Mr. Martin afterwards asked him some question as to his personal knowledge, and it turned out that some things he testified to were hearsay. The point may become of considerable importance, in view of the course the testimony is taking.

Mr. MARTIN.—I objected about that time to anything about the payment, on the ground that it was not the best evidence, that the payrolls would be the

(Testimony of D. A. Dean.)

best evidence as to how those men were classified on there, and how they were paid for.

An adjournment was thereupon taken until 10 A. M., Monday, Feb. 17, 1913. [90]

At 10 A. M., Monday, Feb. 17, 1913, the Court resumed its session, pursuant to adjournment, all parties being present.

[Testimony of D. A. Dean, for Defendant.]

D. A. DEAN, a witness duly called and sworn in behalf of the defendant, testified as follows, on

Direct Examination.

(By Mr. MARTIN.)

Q. You may state your name, Mr. Dean.

A. D. A. Dean.

Q. And your residence? A. Boise.

Q. And your occupation or business?

A. Superintendent of construction.

Q. For what company are you superintendent of construction? A. James Stewart & Company.

Q. They are in the general building construction business? A. They are.

Q. How long have you been engaged as the building contractor? A. Six or seven years.

Q. For what firm or firms have you worked during that time?

A. Hoover & Mason of Chicago, the American Bridge Company, and several smaller firms.

Q. And in what localities have you been in that business?

A. Principally in Chicago and Denver and Omaha.

(Testimony of D. A. Dean.)

Q. How long have you been engaged in that business in this locality?

A. Well, I was in Denver in about 1909. I have been west since then.

Q. And in Boise, how long have you been engaged in the general contracting business? **[91]**

A. About two years in Boise.

Q. Do you know what the term "steelman" or "steelmen," in the building trade or business, signifies, as a class of workmen?

A. Structural steel erectors.

Q. What are the marks which distinguish a steelman, as applied to a class of workmen?

A. A man that is familiar with the use of the tools in connection with the erection and fabrication of structural steel.

Q. And I suppose that in practically every job that you have undertaken as a building contractor you have also used the classification of laborers known as common laborers? A. We have.

Q. What does the term common laborer signify?

A. Well, a man that can run a wheelbarrow, a shovel and pick,—some of the rougher tools of the building trades.

Mr. MARTIN.—That is all.

Cross-examination.

(By Mr. FRASER.)

Q. Supposing a steelman was to run the wheelbarrow and shovel dirt for a while, what would you classify him?

A. I don't believe you could get one to do it.

(Testimony of D. A. Dean.)

Q. But if they did do it. They could do it if they wanted to? A. I think so.

Q. There wouldn't be any reason why they wouldn't, except that they don't care to do that kind of work, is that what you mean? A. Yes.

Mr. FRASER.—That is all. [92]

Mr. MARTIN.—The defendant rests.

[Testimony of C. H. Lee, for Plaintiffs (Recalled in Rebuttal).]

C. H. LEE, recalled as a witness for the plaintiffs in rebuttal, testified as follows, on

Direct Examination.

(By Mr. FRASER.)

Q. Calling your attention to Exhibit No. 7, just state what that is, generally. Without reading it, just state generally what it is. You can go over it afterwards.

A. It is a letter on the Pennsylvania Casualty Company's heading, addressed to A. S. Whiteway & Co., Boise, Idaho, speaking in general terms of this Mr. Irvin, when the accident occurred.

Q. Did you receive that letter through the mails?

A. Yes, sir.

Q. It came into your possession in the regular course of the mails? A. Yes, sir.

Q. You got it through the postoffice?

A. Through the postoffice, yes, sir.

Mr. FRASER.—I offer it in evidence.

Mr. MARTIN.—If the Court please, we will object to the introduction or the admission of Plaintiff's Exhibit No. 7 in evidence, for the reason that

(Testimony of C. H. Lee.)
it is in the nature of a compromise settlement, as shown on the last page of that exhibit, and it is incompetent, irrelevant and immaterial, and improper rebuttal.

The COURT.—Sustained. [93]

Mr. FRASER.—If the Court please, before the objection is sustained, the object of introducing this letter isn't as far as the compromise is concerned, but in the answer in this case they allege that they were misled, and that statements had always been made to them that this man was a common laborer, and they based their defense on the ground that they were to a certain extent misled by the fact that this man was a common laborer; and that letter goes to show that they made several—they introduced in evidence here, as a part of their case, a statement signed by A. S. Whiteway & Company, in which the words "common laborer" are used, as well as other things; and that is just for the purpose of showing and answering that part of the defense, that they were misled by the fact that they believed him to be a common laborer, and therefore took no action at all, and we just desire to show that that part of it wasn't true,—not introducing it as a compromise, but just for the purpose of showing that they had mentioned several specific reasons there for their declining to proceed further in the settlement, and the fact that he was a common laborer, or that he was represented as such, is not mentioned in that document.

The COURT.—What have you to say as to that, Mr. Martin? Perhaps it is admissible for that very limited purpose.

(Testimony of C. H. Lee.)

Mr. FRASER.—That is all we desire.

Mr. MARTIN.—If the Court please, that letter there does not show that anything was said concerning [94] the matter whether or not this man was a common laborer, but that could not be brought out by the company at the time that this case in the District Court was pending, for the reason that it might be that the facts would turn out that the man was a steelman, that is, it might turn out that what he was doing would be proven in such a way in the District Court that the fact would be that this man was a steelman, and would actually be covered by the policy, in which case it would be the duty of the Pennsylvania Casualty Company to come in and defend, but where they have set up all during this first case, or when they pleaded in the District Court, that this man was a common laborer, and have also by their reports said that this man was a common laborer, then we say we were misled, if the fact turned out as they pleaded it in their complaint in the case in this court, and at the time that letter was written the matter stood then as if this man was a common laborer.

Mr. FRASER.—I desire to call your attention to the specific allegations in your answer.

The COURT.—I think I shall let it go in for that purpose. As I understand, this letter was written at least after this notice was given of the injury?

Mr. FRASER.—Yes, the dates show that.

The COURT.—You introduced the report?

Mr. FRASER.—Yes.

The COURT.—For the purpose of showing that it

(Testimony of C. H. Lee.)

was their claim that he was a common laborer? **[95]**

Mr. FRASER.—And that they were misled by that. In other words, if the Court please—

The COURT.—I think I understand the situation.

Mr. MARTIN.—That letter also reserves the right to make that defense.

Mr. FRASER.—It doesn't say anything about that particular—

Mr. MARTIN.—But reserves all rights.

The COURT.—Yes.

Mr. MARTIN.—And it seems that the purpose of that letter, your Honor, was a compromise settlement. That seems to be the gist of that letter.

The COURT.—Well, it will be considered (there is no danger of prejudice, since it is not before the jury) only so far as it may bear upon that question. It may be that in the light of all the record it shouldn't be given any weight at all, that is, any considerable weight.

(Said Plaintiff's Exhibit No. 7 was thereupon marked "Admitted.")

Q. Mr. Lee, you heard the testimony of Mr. Irvin as to the different duties that he performed for you during and around the erection of this building in controversy? A. Yes, sir.

Q. Was there any difference in the classification of his work during time, for instance, that he was wheeling dirt, or carrying bricks, or doing these other matters which he testified he did at several times—how was he classified during that period of

(Testimony of C. H. Lee.)

time while he was working on those particular things?

A. He was classified as working on steel.

Q. Was he paid as a steelman during that time?

[96]

A. He was paid $2.50 a day, the same as all the other men that worked on steel; nobody got more than $2.50 a day for working on steel; they were all in that classification, and all their wages went into the steel classification, on which we paid six and a half per cent. One or two got $3.00 a day, but the most of them got only $2.50.

Q. Then all the wages he received during the time he was working there, whether it was wheeling brick or mortar, or these other matters which he said he did, was included in the estimated premium which you paid the company, under the steel classification?

Mr. MARTIN.—That is objected to as leading.

A. Every dollar.

The COURT.—Well, it is, yes. He has answered. I shall let it stand. It was a leading question. You can cross-examine him and see what he knows about it.

Mr. FRASER.—That is all I desire to ask Mr. Lee at the present time.

Cross-examination.

(By Mr. MARTIN.)

Q. What did Mr. Butler get, Mr. Lee?

A. Mr. Butler got $6.00 a day.

Q. He was working on the steel, was he not?

A. No; he was general foreman. He don't work

(Testimony of C. H. Lee.)

on anything particularly; he was general foreman.

Q. Wasn't he working on the steel at the time Mr. Irvin was hurt?

A. No; he is the general foreman, has charge of all the men. He isn't supposed to work on anything particularly at all; he is foreman. **[97]**

Q. Will you say that Mr. Butler was not working upon the steel when Mr. Irvin was hurt?

A. He never worked on the steel that I know of.

Q. You were not present when Mr. Irvin was hurt? A. No, I wasn't present.

Q. How do you know Mr. Butler was not working on the steel?

A. On general principles, because he never does work on those things.

Q. And that is the only way you know?

A. Yes.

Q. Who kept the pay-roll? A. Mr. Butler.

Q. At the time Mr. Irving was injured?

A. Mr. Butler keeps the time all the time when he is on the job as foreman, yes, sir.

Mr. MARTIN.—That is all.

Redirect Examination.

(By Mr. FRASER.)

Q. You paid the men, did you, their wages, on the time that Mr. Butler kept and turned in to you?

A. Yes, sir, when I was present.

Q. Well, your company did?

A. Yes, our company always does. When I wasn't there, Mr. Whiteway officiated.

(Testimony of C. H. Lee.)

Mr. FRASER.—That is all. I presume, Mr. Martin, that all these documents offered on both sides can be considered as read by the court instead of taking the time to read them at the present time.

Mr. MARTIN.—Yes. [98]

(A certain document was thereupon marked Plaintiff's Exhibit No. 8.)

Mr. FRASER.—I desire to offer that in evidence.

Mr. MARTIN.—The defendant objects to the introduction of Plaintiff's Exhibit No. 8, on the ground that it is incompetent, irrelevant and immaterial, and does not tend to prove or disprove any of the issues in the case.

(Handing exhibit to Judge.)

Mr. FRASER.—If the Court please, in answer to that I desire to say—

The COURT.—What is the third cause of action?

Mr. FRASER.—The third cause of action is the common-law cause of action. It is set up in their answer that one ground of the defense—

The COURT.—I understand your position. The objection is overruled. That is, you put this in to meet the defense that notice—

Mr. FRASER.—That notice was accepted, and that notice applies only to the employer's liability statute. That is all.

Mr. MARTIN.—That is all.

(Said Plaintiff's Exhibit No. 8 was thereupon marked "Admitted.")

The COURT.—You mean you rest?

Mr. FRASER.—Yes.

(Testimony of C. H. Lee.)

The COURT.—I will hear you briefly.

Thereupon, and after argument by counsel the Court orally discussed the evidence and announced the findings of fact in favor of the plaintiff, reserving for further consideration the question of the right of the plaintiffs to recover the attorneys' fees claimed and later announced its conclusions upon that question. [99]

COURT.—I have concluded that under the following provision of the policy:

> "E. No action shall lie against the Company to recover any loss under paragraph one of this policy unless it shall be brought by the assured for loss actually sustained and paid by him in money in satisfaction of a judgment after trial of the issue, and no such action shall lie to recover under any other agreement unless brought by the assured himself to recover money actually expended by him. In no event shall any such action lie unless brought within ninety (90) days after the right of action accrues as herein provided."

I can allow only attorney's fees that have been actually paid, the language being that "No such action shall lie to recover under any other agreement unless brought by the assured himself to recover money actually expended by him."

(The exhibits hereinbefore referred to are hereunto annexed.) [100]

Plaintiffs' Exhibit No. 2.

Boise,Idaho, Aug. 13, 1911. No. 753

THE BANK OF IDAHO.

Pay to the order of Bradley Sheppard, Agent, $34.80 Thirty four & 80/100 Dollars.

Balance on Policy 2753—Dated July 1, 1910.

WHITE–LEE CONSTRUCTION CO.

Per C. H. LEE.

Endorsement: No. 398. Plaintiff's Exhibit No. 2 —Admitted 2/15/13. C.W.M. Bradley Sheppard.

Filed Feb. 17, 1913. A. L. Richardson, Clerk U. S. District Court.

Plaintiffs' Exhibit No. 4.

Caldwell, Idaho, Dec. 26, 1911. No. 27.

FIRST NATIONAL BANK

of Caldwell, Idaho.

Pay to Alfred A. Fraser, or order, $5000.00 Five thousand & 00/100 Dollars.

WHITEWAY–LEE CONSTRUCTION CO.

Per C. H. LEE.

Endorsement: No. 398. Alfred A. Fraser. Plaintiff's Exhibit No. 4—Admitted 2/15/13. C.W.M.

Filed Feb. 17, 1193. A. L. Richardson, Clerk U. S. District Court.

Plaintiffs' Exhibit No. 5.

Boise, Idaho, Dec. 26th, 1911. No. ——.

PACIFIC NATIONAL BANK.

Pay to the order of Karl Paine $5000.00 Five Thousand no/100 Dollars.

For ———.

ALFRED A. FRASER. **[101]**

Endorsement: No. 398. Karl Paine. Plaintiff's Exhibit No. 5. Admitted 2/15/13. C.W.M.

Filed Feb. 17, 1913. A. L. Richardson, Clerk U. S. District Court. **[102]**

Plaintiffs' Exhibit No. 6.

Admitted 2/17/13. C.W.M.

THE PENNSYLVANIA CASUALTY COMPANY,

Home Office, Scranton, Pa.

Scranton, Pa.

Boise, Idaho, June 27th, 1911.

A. S. Whiteway & Co.,

Boise, Idaho.

Gentlemen:—

Your attention is called to the following conditions in your Policy of Liability Insurance # $\frac{27353}{27353}$ viz., "The Premium is based on the entire compensation, whether for salaries, wages, piece work, overtime or allowances earned by the employees of the Assured during the period of this Policy; whenever employees are compensated in whole or in part, by store certificates, board, merchandise, credits, or any other substitute for cash, the amount of com-

pensation covered by such substitutes shall be included in the entire compensation on which the premium is based. If such entire compensation exceeds the sum set forth in the Schedule, the Assured shall immediately pay the Company the additional premium earned; if such compensation is less than the sum set forth in the Schedule, the Company will return the unearned premium when determined. . . . . Any of the Company's authorized Auditors shall have the right and opportunity, whenever the Company so desires, to examine the books and records of the Assured as respects compensation earned by the employees of the assured. . . . .

We therefore ask you to fill in the blanks on the reverse side exactly as indicated, and return the reports promptly. The Company needs this information in making the pay-roll adjustments and your prompt compliance with this request will be much appreciated.

Yours truly,

3123. BRADLEY SHEPPARD.

—OVER—

Form 95 B.

(Endorsed) **[103]**

To the Pennsylvania Casualty Company,
Scranton, Pa.

Gentlemen:—

From June 27th, 1910, to June 27th, 1911, our total expenditures for salaries, wages and overtime, whether paid in cash or by store orders, board or otherwise, all persons in our employ covered under Policy No. 27353, were as follows:

Drivers and Drivers' Helpers.....$.....
Employes in factory, shop, etc. (inside work only) .....$.....
Employes NOT in factory or shop (outside work only) .....$.....
Piece workers .....$.....
Office Employes .....$.....
Executive Officers .....$.....
Constructing four story brick bldg. bet. 10th & 11th Sts. on Main St. Boise, Idaho, Lot 4, Block 16:.....$.....
Masons, bricklayers and carpenters.....$.....
Plasterers and painters .....$.....
Steelmen .....$.....
Electric wiring .....$.....
Sheet metal workers.....$.....
Total.....$.....

Yours truly,

(Signed) _____

Assured.

By _____

Filed Feb. 17, 1913. A. L. Richardson, Clerk U. S. District Court.

No. 398. [104]

Plaintiffs' Exhibit No. 7.

THE PENNSYLVANIA CASUALTY COMPANY.

Home Office, Scranton, Pa.

Deposited with Insurance Commissioner of Pennsylvania, $250,000.

Bradley Sheppard, Agent.

Boise, Idaho, February 9, 1911.

Messrs. A. S. Whiteway & Co.,

Boise, Idaho.

Dear Sirs:—

The writer has been in Boise four days investigating the circumstances surrounding the accident to Mr. J. C. Irwin, injured while in your employ on July 25, 1910, and event in regard to Mr. Irwin's claim for damages against yourselves, subsequent to his injury.

During all my connections with Casualty Insurance I have never known of an instance in which the letter and spirit of an Employer's Liability Policy have been more flagrantly violated by the policy holder that the conditions of your policy have been violated by Mr. Whiteway.

Mr. Whiteway has persistently incited this claimant to bring suit against your firm in order to force a settlement of his claim by this Company. Mr. Whiteway procured an attorney in Boise to call upon Mr. Irwin for the purpose of this attorney being employed by Mr. Irwin to represent him in procuring satisfaction of Mr. Irwin's claim for damages.

On December 19, 1910, Mr. Whiteway accepted in

writing notice of the time, place and cause of accident served upon him by Mr. Irwin's attorney, as required by the Employer's Liability Act of 1909, and waived for yourselves all objections as to the sufficiency of the notice, in direct violation of the terms of the Employers Liability Policy issued by yourselves by the Pennsylvania [105] Casualty Company. No copy of this notice has been furnished to this company, nor has any information *be* conveyed to it by you up to the present time that any notice was received nor its nature or contents.

Mr. Whiteway's entire course of conduct in this case has been so extremely prejudicial to the rights of the Pennsylvania Casualty Company in the matter, that this company feels justified in disclaiming any and all liability on account of Mr. Irwin's claim, under its Employers Liability Policy issued to you.

The writer is informed that both Mr. Whiteway and Mr. Lee of your firm are confined to their rooms by illness, which prevents his communication of the matters herein personally.

The writer is informed that Mr. Irwin's claim against yourselves can be settled for $1500.00. If it is your purpose to compromise this claim without suit, the Pennsylvania Casualty offers to contribute $500.00 to any such settlement as you may make with Mr. Irwin, this being made, however, without prejudice to the rights of the Pennsylvania Casualty Company in disclaiming liability under its said policy, and with the understanding that its acceptance by yourselves constitutes a complete and full release to

said company on account of the claim of Mr. Irwin against you.

Very truly yours,
JNO. A. COLEMAN,
Adjuster.

Plaintiff's Exhibit No. 7. Admitted 2/17/13 C. W. M.

Filed Feb. 17, 1913. A. L. Richardson, Clerk U. S. District Court.

No. 398. [106]

Defendant's Exhibit No. 1.

Admitted 2/15/13. C. W. M.

E. L., FORM 4.

(Do not write in this space)
Kind of Policy.....)
Policy No..... .....)
Agent..... ....)
Limits..... ....)
Premium..... ....)
Date..... ....)
Date received..... .....)

Accident Report No.....
By WHITEWAY & CO.
Boise, Idaho.

INSTRUCTIONS.—In the event of an accident, however slight, to any person, whether an employee or otherwise, a full report must be made upon this blank, being careful to write with ink, and to fully answer each question, and describe the way in which the accident happened.

1. Date of Accident: July 25th, 1910. Hour: 4 P. M. —— A. M.
2. Name of injured person: J. C. Irwin. Color: White.
3. Address of injured person: 517 S. 14th Street, Boise, Idaho.

4. Occupation: Common Laborer. Age: 29. Weekly Wages: $15.00.
5. Family: wife & two children. Length of time in your service: 13 days.
6. Duties of persons injured and how long engaged in said duties: Laboring work in general, thirteen days.
7. If non-employee give place and kind of occupation: ———.
8. Did accident happen in your service or of an independent contractor? In our service.
9. Describe place where accident occurred and what injured person was doing: Basement of the Tyner Building, moving steel girder on dollie.
10. Was accident due to want of care on part of injured person? If so, how? No.
11. Was injury caused by negligence of co-employee? Not that I am aware of.
12. Name appliance, machine, tool, etc., causing accident: Caused by tipping of dollie.
13. Was it impaired, unsafe or unsuited to its work? No.
14. Did injured person know of unsafe condition or defect or any special danger connected with cause of accident? No. [107]
15. Who can prove this and what instructions were given injured person? Instructions given by foreman, James Butler, and witnesses on back of this sheet.
16. Who gave instructions? James Butler (foreman). Were such instructions and all rules

and regulations observed by injured person? Yes.

17. When was last inspection made, by whom and what was the result?

18. Did injured person make any statement and to whom? No.

19. What did he say? ———.

20. Who was in charge of work where accident occurred? (Name and address.) James Butler (Foreman). 427 S. 10th Street, Boise, Idaho.

21. (Name, J. W. Butler. Address, 427 S. 10th Street.

(Name, John Wood. Address, 1220 Main Street.

Witnesses: (Name, A. S. Richmond. Address, 845 Warm Springs Ave.

(Name, Fred Roton. Address, 605 Fort Street.

(Name, Ed Hanrahan. Address, Mitchell Hotel.

All of Boise, Idaho.

22. Has accident ever occurred under like circumstances at same place of machine? No.

23. Nature and extent of injuries. Leg broken three places; can't tell if foot can be saved at this time.

24. Probable length of disability: Eight to twelve months. Where taken after accident? St. Lukes Hospital.

25. Name and address of Doctor: Dr. Titus. Sonna Blk. City.

Dated at Boise, State of Idaho, 26th day of July, 1910.

A. S. WHITEWAY & CO.,
By A. S. WHITEWAY,
Signature of Person Making Report.

GIVE FULL AND DETAILED ACCOUNT OF THE ACCIDENT IN YOUR OWN LANGUAGE.

Moving steel girder on Dollie from front of basement to the rear of basement, cement floor being in place, a small hole caused the dollie to tip, and fell on the man injured.

Filed Feb. 17, 1913. A. L. Richardson, Clerk U. S. District Court.

No. 398. [108]

Defendant's Exhibit No. 3 Offered.

(Not Admitted.)

(Mr. PAINE.)

Q. At this time? A. At this time, yes, sir.

Q. Were you in the employ of the defendants in July, 1910? A. Yes, sir.

Q. What was the nature of your work?

A. Well, it consisted of moving steel and shoveling dirt and handling brick, wheeling concrete, and most everything that there was to do around there.

Q. What— Were you working at your trade for them?

A. No, sir, I was working as a common laborer.

Q. Under what circumstances did you go to work for them as a common laborer?

A. Well, I was working for the Western Glazed Cement & Machine Company of Seattle, and on ac-

count of the strike at the shop there I was delayed; I was working as a traveling machinist, and I was delayed here in Boise for, they said a couple of weeks, I would be delayed here; and when I can't get work at my trade I work at anything I can get to do; so I thought rather than lay around I would just go to work as common laborer until I got a chance to go to work again at my trade, until the strike was off; and I went up and applied for a job of Mr. Butler, which I got.

Q. And where did you go to work?

A. On the site of the Wheeler & Motter Building, known now as the Tyner building or New Boz theater, on the north side of Main Street between Tenth and Eleventh.

Q. And on what day did you go to work?

A. On the 18th day of July, 1910.

Q. What salary did you receive as a common laborer? A. $2.50 a day. [109]

Defendant's Exhibit No. 5.

Admitted, 2/15/13. C. W. M.

Plaintiff's Exhibit "E" for Identification.

10/5/1911, C. W. M.

Admitted in evidence, 10/6/1911. C. W. M.

To A. S. Whiteway & Company,

Boise, Idaho.

YOU ARE HEREBY NOTIFIED that July 25th, 1910, was the time and the basement of the building constructed by you on the site of the building numbered 1008–1010 West Main Street, situated on the north side of Main Street, in the City of

Boise, Idaho, and occupied by The Wheeler-Motter Company when the same was destroyed by fire, was the place of an injury received by me while in your employ in the construction of said building; and the cause of said injury was as follows: That certain of your employees, including myself, placed a heavy girder on a "dolly" under the direction of and assisted by your foreman, James W. Butler, and were in the act of conveying the girder on the "dolly" over and across the concrete floor in said basement, under the direction of and assisted by said foreman, when the "dolly" struck a defective place, viz., a hole in said floor, in such a way as to tilt and cause the girder to fall against and upon my left leg, and cut, mangle and crush the same; that the injury was caused by reason of the said defect in the condition of said floor, which floor was part of the ways and works connected with and used by you in the construction of said building, and which defect arose from or had not been discovered or remedied owing to your negligence and the negligence of your foreman, who was entrusted by you with the duty of seeing that the ways, works and machinery were in proper condition, and said injury was further caused by reason of your negligence and the negligence of your said foreman in the use made of said "dolly" and in the way it was used and in directing the placing of the girder on the "dolly" in the manner it was placed thereon, said foreman being entrusted by you with superintendence of the construction of said building, and being in the exercise of such superin-

tendence, and whose principal duty was that of superintendent.

That at the time of the injury, I was exercising due care and diligence.

J. C. IRWIN,
By KARL PAINE,
His Agent and Attorney.

Service of the foregoing notice by copy is hereby accepted this 17th day of December, 1910, by the undersigned, who was, on July 25th, 1910, and now is a member of the firm of A. S. Whiteway & Company, and I hereby waive for the firm any objections to the sufficiency of said notice, having been present in person at the time of the injury referred to in said notice, and to the sufficiency of the service thereof.

A. S. WHITEWAY.

Filed Feb. 17, 1913. A. L. Richardson, Clerk U. S. District Court.

No. 389. [110]

Plaintiffs' Exhibit No. 8.

STIPULATION.

It is hereby stipulated and agreed by and between counsel for the respective parties herein, that in the case of J. C. Irwin vs. A. S. Whiteway and C. H. Lee, co-partners as A. S. Whiteway & Co., which said action was tried in the District Court of the Third Judicial District of the State of Idaho, in and for Ada County, that the attorneys for the said Irwin elected to stand upon the Third Cause of action set forth in the complaint in that action and that the Court instructed the jury as follows:

"Plaintiff has elected to stand upon his third cause of action, as stated in the complaint, and you will therefore give consideration to the allegations contained in that cause of action alone, and should not consider his first and second causes of action."

It is agreed further that the facts herein stipulated are not to be considered as evidence in this case until duly admitted over all such objections as attorneys for the defendant may desire to make except the objection that it is not the best evidence.

ALFRED A. FRASER,
Attorney for Plaintiff.
MARTIN & CAMERON,
Attorneys for Defendant.

Boise, Idaho, Jan. 31, 1913.

Plaintiff's Exhibit No. 8. Admitted 2/17/13. C. W. M.

Filed Feb. 17, 1913. A. L. Richardson, Clerk U. S. District Court. [111]

[Motion to Vacate Judgment, etc.]

The trial of the cause was concluded on the 16th day of February, 1913, and upon the trial of the cause a stipulation was entered into between counsel for the respective parties, that all objections made and exceptions taken during the progress of the trial might be embodied in a bill of exceptions or statement on motion for a new trial, to be thereafter prepared, the same to have force and effect as if settled in a bill of exceptions upon the trial, either party to have forty days beyond the ten days allowed by the

court rule of this court within which to prepare and serve upon the opposing party such proposed bill of exceptions, the time provided for in said stipulation was further extended, by order of the Court duly made and entered April 1, 1913, for a period of thirty days additional, said last extension having been concurred in by counsel for respective parties, extending the time for preparing and serving the bill of exceptions herein to April 30th, 1913.

Upon motion of defendant, the Court allowed upon stipulation of counsel until March 21, 1913, to file motion for new trial and said motion for new trial was prepared and filed within the time allowed and due notice thereof given and upon the 1st day of April, 1913, which said motion was as follows:

The defendant petitions the above-entitled court and moves that the judgment herein rendered be vacated and a new trial awarded for the following reasons:

1. Irregularity in the proceedings of the Court and irregularity in the proceedings of the adverse party.

2. Accident and surprise which ordinary prudence could not have guarded against.

3. Newly discovered evidence material for the defendant, which defendant could not with reasonable diligence have discovered and produced at the trial.

4. Insufficiency of the evidence to justify the decision and that the decision is against law. [112]

5. Errors in law occurring at the trial.

6. That the right to have a bill of exceptions has

been lost without any fault of the defendant.

Said motion and petition for new trial shall be heard on the assignment of errors accompanying the said motion and petition and specification showing particulars in which the evidence was insufficient to justify the decision, and upon the pleadings, papers and files, the minutes of the court, and the reporter's transcript of the shorthand notes.

The defendant's specification of errors occurring at the trial was as follows accompanying said motion for new trial.

DEFENDANT SPECIFIES THE FOLLOWING ERRORS OF LAW OCCURRING AT THE TRIAL:

The Court erred in the admission of evidence offered by the plaintiff in the following instances, to wit:

1. In the testimony by C. H. Lee in permitting the witness to answer the following question: "These payments you made, $90.10, and this further payment of $34.80, what employees' compensation was included in these payments?" and in overruling defendant's objection thereto.

2. In permitting the witness C. H. Lee to answer the following question: "Mr. Lee, was Irwin put in your payroll then under the schedule of "Steelman?" and in denying defendant's motion to strike the answer.

3. In rejecting portions of Exhibit No. 3 of defendant, which exhibit was a transcript of the reporter's notes of the testimony in the District Court of the Third Judicial District of the State of Idaho

in and for Ada County, in the case where Irwin brought suit against Whiteway and Lee for the personal injury alleged to have been covered by the insurance policy being sued on here, which evidence was in substance [113] as follows:

Question by Irwin's Attorney: "What was the nature of your work?"

Answer by Irwin; "Well, it consisted of moving steel, and shoveling dirt, and handling brick, wheeling concrete and doing most everything there was to do around there."

Question: Were you working at your trade for them?

Answer: No, sir; I was working as a common laborer.

Question: What salary did you receive as a common laborer?

Answer: $2.50 per day.

4. In rejecting a certain contract marked Exhibit 4, which was a liability policy issued by the defendant company to Fred G. Mock, previous to the time the policy being sued on in this case at bar was issued, and in the schedule of which policy, besides the other laborers classified as carpenters, bricklayers, etc., the classification of laborers known as common laborers had been set forth and the rate was set forth as $1.50 per $100 of estimated compensation.

5. In rejecting the following question to be asked the witness Irwin (who was the person injured and the person plaintiff claimed to be covered by the policy sued on here): Q. "I ask you this question, if you did not answer to this question, 'Were you working

at your trade for them?' and your answer was: 'No, sir, I was working as a common laborer?' "

6. In refusing the following question to be asked the witness W. L. Hammond: "Was this man that I have described herein this question as moving steel, shoveling dirt, handling brick, wheeling concrete and doing most everything there was to do around the building, whose wages were $2.50 per day, a steelman?"

7. In refusing the question set forth in paragraph No. 6 immediately above this paragraph to be asked the witness W. L. Hammond with the following addition: "Also taking into consideration the fact as shown here also in the evidence that this man was a machinist by trade." [114]

8. In refusing to allow the following question to be asked the witness Frank H. Paradise: "Where a firm of contractors was engaged in the construction of a four-story brick building, in Boise, Idaho, in July, 1910, and they had in their employ a man that had been working for them about six days, a machinist by trade, who was engaged during the six days in moving steel I-beams and shoveling dirt, and wheeling dirt, and wheeling concrete, handling brick, and doing almost everything there was to do around the building, what would you say that man would be classified as?"

9. In permitting the admission in evidence of Plaintiff's exhibit No. 7 over the objection and exception of defendant.

10. In permitting the admission in evidence of Plaintiff's Exhibit No. 8, over the objection and ex-

ception of defendant.

The defendant submits that the evidence is insufficient to sustain the decision rendered herein in the following particulars:

1. The evidence does not show that the person injured came within the schedule in the insurance policy or contract, which schedule set forth the classes of workmen covered by the policy.

2. The evidence does show that J. C. Irwin, the person injured, was a common laborer and that he was not covered by the policy.

3. The evidence does not show that the man who was injured was a steelman or belonged to any other class of workmen covered by the policy.

4. The evidence does not show that the man who was injured had his entire compensation included within the estimated compensation of steelmen, which amount was $50.00.

5. The evidence is insufficient to justify the decision in that it shows that the plaintiff broke its contract by getting an attorney for Irwin, signing a waiver of a statutory notice for Irwin's attorney and aiding Irwin's attorney at divers times and being in the office of [115] Irwin's attorney before the trial of Irwin's case against the plaintiff here, when the contract provided that the plaintiff should have rendered to the defendant all assistance within plaintiff's power.

After consideration of said motion the Court overruled the same on the 1st day of April, 1913, to which the defendant duly excepted.

TO ALFRED A. FRAZER, ESQ., Attorney for the

plaintiffs in the above-entitled action:

The foregoing is the bill of exceptions proposed by counsel for the defendant in the above-entitled action.

April 21st, 1913.

MARTIN & CAMERON,
Attorneys for the Defendant.

I hereby accept service of the foregoing proposed bill of exceptions, by copy this 21st day of April, 1913.

ALFRED A. FRASER,
Attorney for Plaintiffs.

[Order Settling and Allowing Bill of Exceptions.]

The foregoing bill of exceptions presented the 25th day of April, 1913, is hereby settled and allowed this 3d day of July, 1913.

FRANK S. DIETRICH,
District Judge.

I hereby waive notice of time of the settlement of above Bill of Exceptions.

June 25, 1913.

ALFRED A. FRASER,
Atty. for Plaintiffs.

Filed April 25, 1913. A. L. Richardson, Clerk.

Re-filed July 3, 1913. A. L. Richardson, Clerk.

[116]

In the District Court of the United States, for the District of Idaho, Southern Division.

AT LAW.

A. S. WHITEWAY and C. H. LEE, Copartners as A. S. WHITEWAY & COMPANY,

Plaintiff,

vs.

THE PENNSYLVANIA CASUALTY COMPANY,

Defendant.

Petition for Writ of Error.

Now comes THE PENNSYLVANIA CASUALTY COMPANY, defendant herein, and says that on or about the 19th day of February, 1913, this Court entered judgment herein in favor of the plaintiff, in which judgment and the proceedings had prior thereto in this cause certain errors were committed, to the prejudice of this defendant, all of which will more in detail appear from the assignment of errors which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in this behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for the correction of errors so complained of, and that a transcript of the record, proceedings and papers in the cause, duly authenticated, may be sent to the said Circuit Court of Appeals, and that an order may be made fixing the amount of security which said defendant shall give and furnish upon the issuance of said writ of error, and that upon the giving of said security all further proceedings of this

Court be suspended and stayed until the determination of said writ.

MARTIN & CAMERON,
Attorneys for the Defendant.

[Endorsed]: Filed July 11, 1913. A. L. Richardson, Clerk. [117]

In the District Court of the United States, for the District of Idaho, Southern Division.

A. S. WHITEWAY and C. H. LEE, Copartners as A. S. WHITEWAY & COMPANY,
Plaintiffs,

vs.

THE PENNSYLVANIA CASUALTY COMPANY,
Defendant.

Assignment of Errors.

The defendant in this action, in connection with his petition for a writ of error makes the following assignment of errors, which it avers occurred upon the trial of this cause, to wit:

1. The Court erred, in the testimony of C. H. Lee in permitting the witness Lee to answer the following question: "These payments you made, $90.10, and this further payment of $34.80, what employees' compensation was included in these payments?" and in overruling defendant's objection thereto.

2. In permitting the witness C. H. Lee to answer the question, "Mr. Lee, was Irwin in your payroll then under the schedule of 'steelmen' "? and in denying defendant's motion to strike the answer.

3. In rejecting page 4 of Defendant's Exhibit Number 3, which exhibit was a transcript of the reporter's notes of the testimony in the District Court of the Third Judicial District of the State of Idaho in and for Ada County, in the case where Irwin brought suit against Whiteway and Lee for the personal injury alleged to have been covered by the insurance policy sued on here, which page 4 of said Exhibit 3 was in substance as follows: [118]

Question by Irwin's attorney: "What was the nature of your work?

Answer by Irwin: Well, it consisted of moving steel, and shoveling dirt, and handling brick, wheeling concrete and doing most everything there was to do around there."

Question: Were you working at your trade for them?

Answer: No, sir; I was working as a common laborer.

Question: What salary did you receive as a common laborer?

Answer: $2.50 per day.

4. In rejecting a certain contract marked Exhibit 4, which was a liability policy issued by the defendant to Fred G. Mock, previous to the time the policy being sued on in this case at bar was issued, and in the schedule of which policy, besides the other laborers classified as carpenters, bricklayers, etc., the classification of laborers known as common laborers had been set forth and the rate was set forth as $1.50 per $100 of estimated compensation.

5. In rejecting the following question asked the witness Irwin, (who was the injured person and the person plaintiff claimed to be covered by the policy sued on here): Q. I ask you this question, if you did not answer to this question, "Were you working at your trade for them?" and if your answer was: "No, sir, I was working as a common laborer."

6. In refusing to allow the following question to be asked the expert witness Hammond, "Was this man, that I have described here, in this question, as moving steel, shovelling dirt, handling brick, wheeling concrete and doing most everything there was to do around there, the building, whose wages were $2.50 per day, a steelman?"

7. In refusing the question set forth in paragraph number six immediately above this paragraph to be asked the said witness [119] Hammond with the following addition: "Also taking into consideration the fact as shown here also in evidence that this man was a machinist by trade."

8. In refusing to allow the following question to be asked the witness Frank H. Paradise: "Where a firm of contractors was engaged in the construction of a four-story brick building, in Boise, Idaho, in July, 1910, and they had in their employ a man that had been working for them about six days, a machinist by trade, who was engaged during the six days in moving steel I-beams and shovelling dirt, and wheeling dirt, and wheeling concrete, handling brick and doing almost everything there was to do around the building, what would you say that man would be classified as?"

9. In permitting the admission in evidence of plaintiff's Exhibit No. 7 over the objection and exception of defendant.

10. In permitting the admission in evidence of Plaintiff's Exhibit Number Eight, over the objection and exception of defendant.

11. In refusing to grant defendant's motion for a new trial.

WHEREFORE, the defendant prays that the judgment and the findings rendered in the trial court in favor of the plaintiff be set aside and reviewed and that the defendant be granted a new trial.

MARTIN & CAMERON,
Attorneys for the Defendant.

[Endorsed]: Filed July 11, 1913. A. L. Richardson, Clerk. [120]

In the District Court of the United States, for the District of Idaho, Southern Division.

A. S. WHITEWAY and C. H. LEE, Copartners as A. S. WHITEWAY & COMPANY,
Plaintiffs,

vs.

THE PENNSYLVANIA CASUALTY COMPANY,
Defendant.

Order Allowing Writ of Error.

This 11th day of July, 1913, came the defendant and filed herein and presented to this Court its petition praying for the allowance of a writ of error intended to be urged by said defendant, and said de-

fendant having filed herein an assignment of errors, as provided by law, in consideration whereof, it is ordered that a writ of error to the United States Circuit Court of Appeals for the Ninth Circuit from the judgment hereinbefore, to wit, on the 19th day of February, 1913, made and entered in favor of the plaintiff herein and against the defendant herein, be and the same is hereby allowed, and that a complete transcript of the record forthwith be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, sitting at the City of San Francisco, State of California.

Dated at Boise, Idaho, this 11th day of July, 1913.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed July 11, 1913. A. L. Richardson, Clerk. [121]

In the District Court of the United States, for the District of Idaho, Southern Division.

A. S. WHITEWAY and C. H. LEE, Copartners as A. S. WHITEWAY & COMPANY,
Plaintiffs,

vs.

THE PENNSYLVANIA CASUALTY COMPANY,
Defendant.

Order for Filing Bond.

The defendant having this day filed its petition for a writ of error from the judgment thereon made and entered herein, to the United States Circuit

Court of Appeals, in and for the Ninth Circuit, together with its assignment of errors within due time, and also praying that an order may be made fixing the amount of security which said defendant should give and furnish upon said writ of error, and that upon the giving of said security all further proceedings of this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals in and for the Ninth Judicial District, and said petition having this day been duly allowed,

ORDERED, that upon the defendant filing with the clerk of this court a good and sufficient bond in the sum of $7,000.00 to the effect that if the said defendant and plaintiffs in error shall prosecute the said writ of error to effect, and answer all damages and costs, if it fails to make its plea good, then the said obligation is to be void, else to remain in full force and [122] virtue, the said bond to be approved by the Court, that all further proceedings in this court be, and they are hereby, suspended and stayed until the determination of this writ of error by the United States Circuit Court of Appeals.

Dated July 11th, 1913.

FRANK S. DIETRICH,
Judge.

[Endorsed]: Filed July 11, 1913. A. L. Richardson, Clerk. [123]

In the District Court of the United States for the District of Idaho, Southern Division.

A. S. WHITEWAY and C. H. LEE, Copartners, as A. S. WHITEWAY & CO.,

Plaintiff,

vs.

THE PENNSYLVANIA CASUALTY COMPANY,

Defendant.

Order Allowing Withdrawal of Certain Original Exhibits.

ORDERED that original exhibit of plaintiff, number one, and original exhibit of defendant, number four, on the trial of this cause and not set forth at length in the bill of exceptions herein, and referred to in said bill of exceptions, be allowed to be withdrawn from the files for the purpose of being transmitted to the United States Court of Appeals for the Ninth Circuit as part of the record upon writ of error to the said United States Circuit Court of Appeals, in this cause.

FRANK S. DIETRICH,

Judge.

[Endorsed]: Filed July 11, 1913. A. L. Richardson, Clerk. **[124]**

In the District Court of the United States for the District of Idaho, Southern Division.

A. S. WHITEWAY and C. H. LEE, Copartners, as A. S. WHITEWAY & COMPANY,
Plaintiffs,

vs.

THE PENNSYLVANIA CASUALTY COMPANY,
Defendant.

Bond on Appeal on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: that we, THE PENNSYLVANIA CASUALTY COMPANY, a corporation, as principal, and THE TITLE GUARANTY & SURETY COMPANY OF SCRANTON, PENNSYLVANIA, as surety, are held and firmly bound unto A. S. Whiteway and C. H. Lee, copartners, as A. S. Whiteway & Company, in the full and just sum of $7,000.00, to be paid to the said A. S. Whiteway and C. H. Lee, copartners, as A. S. Whiteway & Company, its certain attorney or representatives; to which payment well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally by these presents. Sealed with our seals and dated this 18th day of July, 1913.

WHEREAS, in the above-entitled court between the above-named parties a judgment was rendered against the defendant, and the defendant having obtained from the said court a writ of error to reverse the judgment in the aforesaid suit, and a citation directed to the said plaintiff citing and admonishing

it to appear and be at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco on the 11th day of **[125]** August, 1913, next.

Now, the condition of the above obligation is such that if the said defendant shall prosecute the said writ of error to effect and answer all damages and costs if they fail to make their said plea good, then the above obligation to be void; else to remain in full force and effect.

THE PENNSYLVANIA CASUALTY COMPANY,
By MARTIN & CAMERON,
Its Attorneys.

TITLE GUARANTY & SURETY COMPANY OF SCRANTON, PENNSYLVANIA.
[Seal] By FRANK B. KINYON,
Its Attorney in Fact.

Approved July 11, 1913.
DIETRICH,
Judge.

[Endorsed]: Filed July 18, 1913. A. L. Richardson, Clerk. **[126]**

In the District Court of the United States for the District of Idaho, Southern Division.

A. S. WHITEWAY & C. H. LEE, Copartners, as A. S. WHITEWAY & COMPANY,
Plaintiff,
vs.
THE PENNSYLVANIA CASUALTY COMPANY,
Defendant.

Writ of Error.

From the United States Circuit Court of Appeals for the Ninth Circuit to the United States District Court for the District of Idaho, Southern Division.

United States of America,—ss.

The President of the United States, to the Honorable Judge of the District Court of the United States for the District of Idaho, Southern Division, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment, of a plea which is in the said District Court, before you, between A. S. Whiteway and C. H. Lee, copartners, as A. S. Whiteway & Company, plaintiff, against The Pennsylvania Casualty Company, defendant, a manifest error hath happened, to the great damage of the said The Pennsylvania Casualty Company, defendant, as by his complaint appears, we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if the judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said circuit, on the 11th day of August, 1913, in the said Circuit Court of Appeals, to be then and there held, that **[127]** the records and proceedings aforesaid being inspected, the said Circuit Court of Ap-

peals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

WITNESS, the Honorable EDWARD D. WHITE, Chief Justice of the United States, this 11th day of July, 1913, and in the year of the Independence of the United States of America, the one hundred and thirty-eighth.

Allowed by

FRANK S. DIETRICH,
United States District Judge.

[Seal] Attest: A. L. RICHARDSON,
Clerk of the District Court of the United States, District of Idaho.

Service of the foregoing writ of error admitted this 11th day of July, 1913.

ALFRED A. FRASER,
Per R. R. W.
Attorney for Plaintiff. [128]

[Endorsed]: #398. In the District Court of the United States for the District of Idaho, Southern Division. A. S. Whiteway et al., Plaintiffs, vs. The Pennsylvania Casualty Co., Defendant. Writ of Error. Filed July 18, 1913. A. L. Richardson, Clerk. [129]

In the District Court of the United States for the District of Idaho, Southern Division.

A. S. WHITEWAY & C. H. LEE, Copartners, as A. S. WHITEWAY & COMPANY,
Plaintiffs,

vs.

THE PENNSYLVANIA CASUALTY COMPANY,
Defendant.

Citation.

The United States of America,—ss.

To A. S. Whiteway and C. H. Lee, Copartners, as A. S. Whiteway & Company, and to A. A. Fraser, Attorney for the Plaintiff, Greeting:

You are hereby cited and admonished to be and appear at a term of the United States Circuit Court of Appeals for the Ninth Circuit to be holden in the City of San Francisco, State of California, on the 11th day of August, 1913, pursuant to the writ of error filed in the office of the Clerk of the District Court of the United States, for the District of Idaho, Southern Division, wherein the parties, A. S. Whiteway and C. H. Lee, copartners as A. S. Whiteway & Company, are plaintiffs, and The Pennsylvania Casualty Company, is defendant and plaintiff in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and why speedy justice should not be done to parties in that behalf.

FRANK S. DIETRICH,
Judge.

Service of the within and foregoing citation accepted this 11th day of July, 1913.

ALFRED A. FRASER,
Per R. R. W.
Attorney for Defendant in Error. **[130]**

[Endorsed]: No. 398. In the District Court of the United States for the District of Idaho, Southern Division. A. S. Whiteway et al., Plaintiff, vs. The Pennsylvania Casualty Company, Defendant. Citation. Filed July 18, 1913. A. L. Richardson, Clerk. **[131]**

In the District Court of the United States for the District of Idaho, Southern Division.

A. S. WHITEWAY and C. H. LEE, Copartners, as A. S. WHITEWAY & COMPANY,
Plaintiff,

vs.

THE PENNSYLVANIA CASUALTY COMPANY,
Defendant.

Order [Directing Transmission of Transcript of Record, etc., to Appellate Court].

IT IS ORDERED by the Court that a transcript of the record and proceedings in the cause aforesaid, together with all things thereunto relating, be transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit, and the same be transmitted accordingly.

[Seal] Attest: A. L. RICHARDSON,
Clerk. **[132]**

[Certificate of Clerk U. S. District Court to Transcript of Record.]

In the District Court of the United States for the District of Idaho, Southern Division.

A. S. WHITEWAY and C. H. LEE, Copartners, as A. S. WHITEWAY and COMPANY,
Plaintiff,

vs.

THE PENNSYLVANIA CASUALTY COMPANY,
Defendant.

I, A. L. Richardson, Clerk of the District Court of the United States, for the District of Idaho, do hereby certify the foregoing transcript of pages, numbered from 1 to 133, inclusive, to be full, true and correct copies of the pleadings and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record and return to the annexed writ of error.

I further certify that the cost of the record herein amounts to the sum of $70.00 and that the same has been paid by the appellant.

Witness my hand and the seal of said District Court, affixed at Boise, Idaho, this 23d day of July, 1913.

[Seal] A. L. RICHARDSON,
Clerk. **[133]**

[Endorsed]: No. 2297. United States Circuit Court of Appeals for the Ninth Circuit. The Pennsylvania Casualty Company, Plaintiff in Error, vs. A. S. Whiteway and C. H. Lee, Copartners, as A. S. Whiteway & Company, Defendants in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Idaho, Southern Division.

Received and filed August 7, 1913.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Meredith Sawyer,

Deputy Clerk.

Plaintiff's Exhibit 1

Policy of Insurance of Pennsylvania Casualty Co., Issued to A. S. Whiteway & Co.

FORM NO 425 ED 6-08

No. 27353

THE PENNSYLVANIA Casualty Company

COAT-OF-ARMS—STATE OF PENNSYLVANIA

OF SCRANTON, PENNSYLVANIA

(HEREINAFTER CALLED THE COMPANY)

Does Hereby Agree with

- - - - - - A. S. Whitaway & Company - - - - -

(HEREINAFTER CALLED THE ASSURED)

In Consideration *of the payment of the premium as hereinafter provided and the Declarations on page three of this policy:*

INDEMNITY

1. **To Indemnify** the Assured, subject to the limits expressed in Statement Four of the Declarations against loss by reason of the liability imposed upon him by law for damages on account of bodily injuries, including death at any time resulting from such injuries accidentally sustained during the period of this Policy by reason of the business operations described and conducted at the locations named in said Declarations by all employees of the Assured as hereinafter provided.

SUITS, COSTS & EXPENSES

2. **To Defend** in the name and on behalf of the Assured any suits, even if groundless, which may at any time be brought on account of such injuries and to PAY all costs taxed against the Assured under any legal proceedings defended by the Company, all expenses incurred in the investigation of such injuries and in the negotiations for settlement, all expense of the contest of claims arising therefrom, and all interest on such part of any judgment as shall not be in excess of the limits of the Company's liability as hereinafter expressed.

SURGICAL RELIEF

3. **To Reimburse** the Assured for all expenses incurred by him for such immediate surgical relief as shall be imperative at the time any such injury is sustained.

PERSONS & OPERATIONS COVERED

4. **This Policy** shall cover as above provided: (1) All such injuries sustained at the locations described in the Declarations by all employees of the Assured whose entire compensation is included in the estimated compensation as shown in Statement Three of the Declarations, including also drivers employed by the Assured who are specifically enumerated in any concurrent Teams policy carried by the Assured in this Company while such drivers are engaged in any duties other than those of a driver. (2) All such injuries sustained by such employees caused by any person wholly engaged in clerical or office duties, the Assured himself if the Assured is an individual, any member of the firm if the Assured be a firm, the President, Vice-President, Secretary and Treasurer if the Assured be a Corporation, but injuries to the persons described in this clause shall not be covered unless the compensation paid to such persons is included in the estimated compensation. (3) All such injuries sustained by drivers, and their helpers, lumpers, stevedores, loaders, material handlers, time-keepers, pay-clerks and messengers whose entire compensation is included in the estimated compensation upon which the premium for this policy is computed, wherever they may be in the service of the Assured in connection with the business operations described in the Declarations. This policy shall not cover injuries sustained by any person or persons except as above provided nor any injuries occasioned by reason of the failure of the Assured to observe any statute affecting the safety of persons, nor any injuries occasioned by reason of the failure of the Assured to observe any local ordinance of which he has knowledge, nor any injuries sustained or caused by any person employed by the Assured in violation of law as to age or under the age of fourteen years if there is no legal age limit, or by any contract convict laborer, nor liability of others assumed by the Assured under any contract or agreement, oral or written.

These Agreements are subject to the following conditions:

PREMIUM

A. The premium is based upon the entire compensation earned during the policy period by all employees of the Assured, not herein elsewhere specifically excluded, engaged in connection with the operations described in and covered by this Policy. The premium is subject to adjustment at the termination of the policy or at the end of each period of one year if the policy be written for a longer term, when the Assured shall furnish to the Company for the purpose of said adjustment a written Declaration of the exact amount of compensation earned by the said employees during the said period. If the earned premium computed thereon at the rate or rates specified in Statement Three exceeds the estimated premium paid, or such portion of it as represents the premium for the annual period, the Assured shall immediately pay the additional amount to the Company; if less, the Company shall return to the Assured the unearned premium, but, except in the event of cancellation by the Company or by the Assured when the Assured is retiring from business, the Company shall receive or retain the minimum premium provided in Statement Twelve. The word "Compensation" used in this paragraph shall include all salaries, wages and other sums paid for regular time, overtime, piecework or for allowances and also the cash equivalent of all board, merchandise, store certificates, credits or any other substitute for cash.

CANCELLATION

B. This policy may be cancelled by the Company at any time by written notice served on or sent by registered letter to the Assured at the address given herein, stating when the cancellation shall be effective. It may be cancelled by the Assured by like notice to the Company. If cancelled by the Company, the Company shall be entitled to the earned premium pro rata when determined. If cancelled by the Assured unless the Assured has retired from business, the Company shall receive or retain the customary short-rate premium. (In either case the earned premium shall be computed on the compensation for the year as indicated by the actual compensation earned by the employees of the Assured during the time the policy shall have been in force.) In any case the Company shall receive or retain the minimum earned premium stated in Statement Twelve. The Company's check mailed to the address of the Assured as given herein shall be a sufficient tender, but no return premium shall be payable until a statement of the actual compensation earned by the employees of the Assured during the period the policy was in force shall have been furnished to the Company by the Assured.

INSPECTION

C. The Company shall be permitted at all reasonable times during the policy period to inspect the plant, works, machinery, and appliances covered by this policy and to examine the Assured's books at any time during the policy period or any extension thereof, or within one year after its final expiration so far as they relate to the compensation earned by his employees while the policy was in force

NOTICE D Upon the occurrence of an accident the Assured shall give immediate written notice thereof to the Company, or its duly authorized agent, with the fullest information obtainable. He shall give like notice with full particulars of any claim made on account of such accident. If thereafter any suit is brought against the Assured he shall immediately forward the Company every summons or other process served upon him. The Assured when requested by the Company shall aid in effecting settlements, securing evidence, the attendance of witnesses and in prosecuting appeals, and shall at all times render to the Company all co-operation and assistance in his power. He shall not voluntarily assume any liability, except as provided in Paragraph Three of the insuring clause, settle any claims or incur any expense, except at his own cost, or interfere in any negotiations for settlement or legal proceeding without the consent of the Company previously given in writing.

ASSURED'S RIGHT OF RECOVERY E. No action shall lie against the Company to recover for any loss under Paragraph One of this Policy unless it shall be brought by the Assured for loss actually sustained and paid by him in money in satisfaction of a judgment after trial of the issue, and no such action shall lie to recover under any other agreement unless brought by the Assured himself to recover money actually expended by him. In no event shall any such action lie unless brought within ninety (90) days after the right of action accrues as herein provided.

SPECIAL STATUTES F. Any limitations or requirement of this Policy as respects time for notice of accident or for any legal proceeding conflicting with the law of the State in which the policy is issued shall be construed as amended to conform with such law.

ASSIGNMENT G. No assignment of interest under this Policy shall bind the Company unless the consent of the Company shall be endorsed hereon.

CONCURRENT INSURANCE H. If the Assured shall carry a policy of another insurer, whether valid or not, against a loss covered by this Policy, the Assured shall not be entitled to recover from the Company a larger proportion of the entire loss than the amount hereby insured bears to the total amount of his insurance.

SUBROGATION I. In the case of payment of loss under this Policy, the Company shall be subrogated to all rights of the Assured against any person or corporation, as respects such loss, to the amount of such payment, and the Assured shall execute all papers required and shall co-operate with the Company to secure to the Company such rights.

WAIVERS AND ALTERATIONS J. No condition or provision of this Policy shall be waived or altered except by endorsement attached hereto signed by the President, Vice-President, Secretary or Assistant Secretary of the Company; nor shall any notice to any agent, nor shall knowledge possessed by any agent or by any other person, be held to effect a waiver or change in any part of this contract. The personal pronoun herein used to refer to the Assured shall apply regardless of number or gender.

WARRANTIES K. Statements of the Declarations on page three of this Policy, numbers One to Twelve inclusive are warranted by the Assured to be true and correct except such as are declared to be matters of estimate only. This Policy is issued in consideration of and upon the faith of such warranties, the provisions of the policy respecting its premium and the payment of the premium as expressed in the Declarations.

In Witness Whereof, THE PENNSYLVANIA CASUALTY COMPANY of Scranton, Pa., has caused this policy to be signed by its President and Secretary at Scranton, Pa., and countersigned by a duly authorized agent of the Company.

F. H. Kingsbury, Secretary. *Thomas E. Jones*, President.

Countersigned at Seattle, Washington the 1st day of July 1910

BRADLEY SHEPPARD
AGENT
BOISE, IDAHO

Hanford & Veuve General Agents.

Declarations

Statement 1. Name of Assured A. S. Whiteway & Company,

Address Boise, Idaho.
(Street, Town and State)

Individual, co-partnership, corporation or estate Co-partnership..

Statement 2. The Policy Period shall be from June 27th, 1910, to June 27th, 1911, at 12 o'clock noon, Standard Time, at Assured's address as to each of said dates.

Statement 3. A full description of the operations covered by this policy, the locations of all places where such operations are conducted, the estimated average number of employees engaged therein, the estimated compensation of such employees for the term of this policy, the premium rate or rates, and the estimated premium, are given hereunder:

Location of all places where business operations are to be conducted	Description of business Operations to be Insured	Estimated Average No. of Employees	Estimated total Annual wages and Other Compensation	Rate per $100 of wages	Estimated Premium
Between 10th & 11th Sts., on Main St., Boise, Idaho. Lot 4, Blk. 16.	Constructing four story brick building:				
	Masons, bricklayers	10/20	1,000.00	2.25	22.50
	Carpenters	10/20	2,000.00	2.25	45.00
	Plasterers	5/10	800.00	1.20	9.60
	Painters	5/10	250.00	1.20	3.00
	Steel men	5/10	50.00	6.50	3.25
	Electric wiring	3/5	250.00	1.50	3.75
	Sheet metal workers	2/5	100.00	3.00	3.00
Special operations at all locations mentioned in this schedule.					
Demolition or wrecking of buildings or structures.					
Operation of locomotives or cars over railroads, rail road switches or sidetracks.					

Total Estimated Premium Ninety end 10/100ths Dollars $ 90.10

Statement 4. The Company's limit of liability, whether only one or more than one interest is covered by this policy, exclusive of expenses referred to in Paragraphs Two and Three of the insuring clause of the policy, for death or injury to one person shall be Five Thousand and no/100ths Dollars ($ 5000.00) and subject to the same limit for each person, the Company's total liability (exclusive of said expense) on account of any one accident causing death or injury to more than one person, shall be limited to Ten Thousand and no/100ths Dollars ($ 10000.00).

Statement 5. The foregoing enumeration of employees includes all persons in the service of the Assured in connection with the operations herein described at the places of such operations and elsewhere to whom compensation of any nature is paid or allowed, except the members of the Assured if a co-partnership, the President, Vice-President, Secretary or Treasurer if a Corporation, any drivers employed by the Assured who are covered in any concurrent Teams Policy carried in this Company, or persons wholly engaged in clerical or office duties. The foregoing estimated compensation is offered for the purpose of computing the estimated premium and shall include the entire compensation (by which is meant all salaries, wages, or other sums paid for regular time, over-time, piece work or for allowances and also the cash equivalent of all board, merchandise, store certificates, credits or any other substitute for cash) earned by all the employees in the service of the Assured engaged in connection with the operations hereinbefore described.

Statement 6. No further exclusion shall be made from the pay-roll, except as herein stated No exceptions.

Statement 7. None of the special operations described will be covered unless the estimated average number of persons engaged in such special operations and their estimated compensation and the premium rate are specifically stated herein.

Statement 8. No explosives are made, sold, kept, or used in the business described herein, except as herein stated No exceptions

Statement 9. No operations of any nature not herein disclosed are conducted by the Assured at the places covered hereby, except as herein stated No exceptions

Statement 10. The estimate of wages or other compensation does not include wages paid by independent sub-contractors, except as herein stated No exceptions

Statement 11. No similar insurance has been declined or cancelled by any Company during the three years last past, except as herein stated No exceptions

Statement 12. The minimum premium for this policy shall be Fifty and no/100ths Dollars ($ 50.00).

Plaintiff's Exhibit No. 1
2/15/13 C.W.M. Admitted

Contractors' Employers' Liability Policy

No. 27353

THE Pennsylvania Casualty Company

COAT OF ARMS—STATE OF PENNSYLVANIA

Issued to

A. S. Whiteway & Company

AGENCY OF

BRADLEY SHEPPARD
AGENT
BOISE IDAHO

Special attention is directed to the provisions of the Policy requiring immediate notice of all accidents, claims and suits.

READ YOUR POLICY CAREFULLY

Case No. 2297
U. S. Circuit Court of Appe
For the Ninth Circuit.

Plaintiff's Exhibit 1

Received Aug 7 1913
F. D. MONCKTON, C

Filed
Feb. 17, 1913
A. L. Richardson
Clerk U. S. District Court

ASSIGNMENT OF INTEREST BY ASSURED

The interest of.....

covered by this policy is hereby assigned to.....

subject to the consent of THE PENNSYLVANIA CASUALTY COMPANY, of Scranton, Pa.

Dated at.....this.....day of.....19....

.....
Signature of the Assured.

Wages estimated for term from.....19....to.....19.... $.....

Wages expected for term from.....19....to.....19.... $.....

Balance, $.....

It being understood and agreed, that $.....is the estimated wage expenditure for the remainder of the term of this policy, viz.: from.....19....to.....19....

.....19....., and the said.....Assignee agreeing to an adjustment as per Condition A of this Policy, THE PENNSYLVANIA CASUALTY COMPANY, hereby consents that the interest of.....

.....

covered by this Policy be assigned to.....

.....

Dated at Scranton, Pennsylvania, this

.....day

of.....19....

.....
Secretary.

Defendant's Exhibit 4

Policy of Insurance of Pennsylvania Casualty Co., Issued to Fred G. Mock.

FORM NO 426 ED 6-06

No. 26472

THE PENNSYLVANIA Casualty Company

COAT-OF-ARMS—STATE OF PENNSYLVANIA

OF SCRANTON, PENNSYLVANIA

(HEREINAFTER CALLED THE COMPANY)

Does Hereby Agree with

- - - - - - Fred G. Mock - - - - - -

(HEREINAFTER CALLED THE ASSURED)

In Consideration *of the payment of the premium as hereinafter provided and the Declarations on page three of this policy:*

INDEMNITY 1. **To Indemnify** the Assured, subject to the limits expressed in Statement Four of the Declarations against loss by reason of the liability imposed upon him by law for damages on account of bodily injuries, including death at any time resulting from such injuries accidentally sustained during the period of this Policy by reason of the business operations described and conducted at the locations named in said Declarations by all employees of the Assured as hereinafter provided.

SUITS, COSTS & EXPENSES 2. **To Defend** in the name and on behalf of the Assured any suits, even if groundless, which may at any time be brought on account of such injuries and to PAY all costs taxed against the Assured under any legal proceedings defended by the Company, all expenses incurred in the investigation of such injuries and in the negotiations for settlement, all expense of the contest of claims arising therefrom, and all interest on such part of any judgment as shall not be in excess of the limits of the Company's liability as hereinafter expressed.

SURGICAL RELIEF 3. **To Reimburse** the Assured for all expenses incurred by him for such immediate surgical relief as shall be imperative at the time any such injury is sustained.

PERSONS & OPERATIONS COVERED 4. **This Policy** shall cover as above provided: (1) All such injuries sustained at the locations described in the Declarations by all employees of the Assured whose entire compensation is included in the estimated compensation as shown in Statement Three of the Declarations, including also drivers employed by the Assured who are specifically enumerated in any concurrent Teams policy carried by the Assured in this Company while such drivers are engaged in any duties other than those of a driver. (2) All such injuries sustained by such employees caused by any person wholly engaged in clerical or office duties, the Assured himself if the Assured is an individual, any member of the firm if the Assured be a firm, the President, Vice-President, Secretary and Treasurer if the Assured be a Corporation, but injuries to the persons described in this clause shall not be covered unless the compensation paid to such persons is included in the estimated compensation. (3) All such injuries sustained by drivers, and their helpers, lumpers, stevedores, loaders, material handlers, time-keepers, pay-clerks and messengers whose entire compensation is included in the estimated compensation upon which the premium for this policy is computed, wherever they may be in the service of the Assured in connection with the business operations described in the Declarations. This policy shall not cover injuries sustained by any person or persons except as above provided nor any injuries occasioned by reason of the failure of the Assured to observe any statute affecting the safety of persons, nor any injuries occasioned by reason of the failure of the Assured to observe any local ordinance of which he has knowledge, nor any injuries sustained or caused by any person employed by the Assured in violation of law as to age or under the age of fourteen years if there is no legal age limit, or by any contract convict laborer, nor liability of others assumed by the Assured under any contract or agreement, oral or written. 1 2

These Agreements are subject to the following conditions:

PREMIUM A. The premium is based upon the entire compensation earned during the policy period by all employees of the Assured, not herein elsewhere specifically excluded, engaged in connection with the operations described in and covered by this Policy. The premium is subject to adjustment at the termination of the policy or at the end of each period of one year if the policy be written for a longer term, when the Assured shall furnish to the Company for the purpose of said adjustment a written Declaration of the exact amount of compensation earned by the said employees during the said period. If the earned premium computed thereon at the rate or rates specified in Statement Three exceeds the estimated premium paid, or such portion of it as represents the premium for the annual period, the Assured shall immediately pay the additional amount to the Company; if less, the Company shall return to the Assured the unearned premium, but, except in the event of cancellation by the Company or by the Assured when the Assured is retiring from business, the Company shall receive or retain the minimum premium provided in Statement Twelve. The word "Compensation" used in this paragraph shall include all salaries, wages and other sums paid for regular time, overtime, piecework or for allowances and also the cash equivalent of all board, merchandise, store certificates, credits or any other substitute for cash.

CANCELLATION B. This policy may be cancelled by the Company at any time by written notice served on or sent by registered letter to the Assured at the address given herein, stating when the cancellation shall be effective. It may be cancelled by the Assured by like notice to the Company. If cancelled by the Company, the Company shall be entitled to the earned premium pro rata when determined. If cancelled by the Assured unless the Assured has retired from business, the Company shall receive or retain the customary short-rate premium. In either case the earned premium shall be computed on the compensation for the year as indicated by the actual compensation earned by the employees of the Assured during the time the policy shall have been in force. In any case the Company shall receive or retain the minimum earned premium stated in Statement Twelve. The Company's check mailed to the address of the Assured as given herein shall be a sufficient tender, but no return premium shall be payable until a statement of the actual compensation earned by the employees of the Assured during the period the policy was in force shall have been furnished to the Company by the Assured.

INSPECTION C. The Company shall be permitted at all reasonable times during the policy period to inspect the plant, works, machinery, and appliances covered by this policy and to examine the Assured's books at any time during the policy period or any extension thereof, or within one year after its final expiration so far as they relate to the compensation earned by his employees while the policy was in force.

NOTICE D. Upon the occurrence of an accident the Assured shall give immediate written notice thereof to the Company, or its duly authorized agent, with the fullest information obtainable. He shall give like notice with full particulars of any claim made on account of such accident. If thereafter any suit is brought against the Assured he shall immediately forward the Company every summons or other process served upon him. The Assured when requested by the Company shall aid in effecting settlements, securing evidence, the attendance of witnesses and in prosecuting appeals, and shall at all times render to the Company all co-operation and assistance in his power. He shall not voluntarily assume any liability, except as provided in Paragraph Three of the insuring clause, settle any claims or incur any expense, except at his own cost, or interfere in any negotiations for settlement or legal proceeding without the consent of the Company previously given in writing. | 3

ASSURED'S RIGHT OF RECOVERY E. No action shall lie against the Company to recover for any loss under Paragraph One of this Policy unless it shall be brought by the Assured for loss actually sustained and paid by him in money in satisfaction of a judgment after trial of the issue, and no such action shall lie to recover under any other agreement unless brought by the Assured himself to recover money actually expended by him. In no event shall any such action lie unless brought within ninety (90) days after the right of action accrues as herein provided. | 4

SPECIAL STATUTES F. Any limitations or requirement of this Policy as respects time for notice of accident or for any legal proceeding conflicting with the law of the State in which the policy is issued shall be construed as amended to conform with such law.

ASSIGNMENT G. No assignment of interest under this Policy shall bind the Company unless the consent of the Company shall be endorsed hereon.

CONCURRENT INSURANCE H. If the Assured shall carry a policy of another insurer, whether valid or not, against a loss covered by this Policy, the Assured shall not be entitled to recover from the Company a larger proportion of the entire loss than the amount hereby insured bears to the total amount of his insurance.

SUBROGATION I. In the case of payment of loss under this Policy, the Company shall be subrogated to all rights of the Assured against any person or corporation, as respects such loss, to the amount of such payment, and the Assured shall execute all papers required and shall co-operate with the Company to secure to the Company such rights.

WAIVERS AND ALTERATIONS J. No condition or provision of this Policy shall be waived or altered except by endorsement attached hereto signed by the President, Vice-President, Secretary or Assistant Secretary of the Company; nor shall any notice to any agent, nor shall knowledge possessed by any agent or by any other person, be held to effect a waiver or change in any part of this contract. The personal pronoun herein used to refer to the Assured shall apply regardless of number or gender.

WARRANTIES K. Statements of the Declarations on page three of this Policy, numbers One to Twelve inclusive are warranted by the Assured to be true and correct except such as are declared to be matters of estimate only. This Policy is issued in consideration of and upon the faith of such warranties, the provisions of the policy respecting its premium and the payment of the premium as expressed in the Declarations.

In Witness Whereof, THE PENNSYLVANIA CASUALTY COMPANY of Scranton, Pa., has caused this policy to be signed by its President and Secretary at Scranton, Pa., and countersigned by a duly authorized agent of the Company.

F. H. Kingsbury, Secretary. *Thomas E. Jones,* President.

Countersigned at Seattle, Washington the 13th day of September 19 09

BRADLEY SHEPPARD
AGENT
BOISE, IDAHO

Hanford & Veuve General Agents.

This space is intended for the attachment of such endorsements as may be executed as provided in Paragraph J, and when so executed and attached they are to be construed as a part of the policy.

SHORT RATE CANCELLATION TABLE

FOR TERM OF ONE YEAR

	Per cent. of Annual Prem.		Per cent. of Annual Prem.
1 day	2	50 days	28
2 days	4	55 "	29
3 "	5	60 "	30
4 "	6	65 "	33
5 "	7	70 "	36
6 "	8	75 "	37
7 "	9	80 "	38
8 "	9	85 "	39
9 "	10	90 "	or three months 40
10 "	10	105 "	45
11 "	11	120 "	or four months 50
12 "	12	135 "	55
13 "	13	150 "	or five months 60
14 "	13	165 "	65
15 "	14	180 "	or six months 70
16 "	14	195 "	73
17 "	15	210 "	or seven months 75
18 "	16	225 "	78
19 "	16	240 "	or eight months 80
20 "	17	255 "	83
25 "	19	270 "	or nine months 85
30 "	20	285 "	88
35 "	23	300 "	or ten months 90
40 "	26	315 "	93
45 "	27	330 "	or eleven months 95
		360 "	or twelve months 100

FOR TERM OF THREE YEARS

	Per cent. of Annual Prem.		Per cent. of Annual Prem.
1 month	10	19 months	72
2 months	17	20 "	73
3 "	20	21 "	75
4 "	23	22 "	77
5 "	27	23 "	79
6 "	30	24 "	80
7 "	33	25 "	81
8 "	37	26 "	83
9 "	40	27 "	85
10 "	43	28 "	86
11 "	47	29 "	88
12 "	50	30 "	90
13 "	53	31 "	91
14 "	57	32 "	93
15 "	60	33 "	95
16 "	63	34 "	96
17 "	67	35 "	98
18 "	70	36 "	100

Declarations

Statement 1. Name of Assured Fred G. Mock.

Address Nampa, Idaho. (Street, Town and State.)

Individual, co-partnership, corporation or estate? Individual.

Statement 2. The Policy Period shall be from September 9th, 1909 to September 9th, 1910, at 12 o'clock noon, Standard Time, at Assured's address as to each of said dates.

Statement 3. A full description of the operations covered by this policy, the locations of all places where such operations are conducted, the estimated average number of employees engaged therein, the estimated compensation of such employees for the term of this policy, the premium rate or rates, and the estimated premium, are given hereunder:

Location of all places where business operations are to be conducted	Description of business Operations to be Insured	Estimated Average No. of Employees	Estimated total Annual wages and Other Compensation	Rate per $100 of wages	Estimated Premium
Nampa, Idaho.	Erection and construction of building corner of 1st and 13th Ave., Nampa, Idaho.				
	Bricklayers	5/10	500.	3.70	18.50
	Carpenters	5/10	1000.	2.70	27.00
	Common laborers	5/10	500.	1.50	7.50
Special operations at all locations mentioned in this schedule.					
Demolition or wrecking of buildings or structures.					
Operation of locomotives or cars over railroads, rail road switches or sidetracks.					

Total Estimated Premium Fifty-three and no/100ths Dollars $ 53.00

Statement 4. The Company's limit of liability, whether only one or more than one interest is covered by this policy, exclusive of expenses referred to in Paragraphs Two and Three of the insuring clause of the policy, for death or injury to one person shall be Five Thousand and no/100ths Dollars ($ 5000.00) and subject to the same limit for each person, the Company's total liability (exclusive of said expense) on account of any one accident causing death or injury to more than one person, shall be limited to Ten Thousand and no/100ths Dollars ($ 10000.00).

Statement 5. The foregoing enumeration of employees includes all persons in the service of the Assured in connection with the operations herein described at the places of such operations and elsewhere to whom compensation of any nature is paid or allowed, except the members of the Assured if a co-partnership, the President, Vice-President, Secretary or Treasurer if a Corporation, any drivers employed by the Assured who are covered in any concurrent Teams Policy carried in this Company, or persons wholly engaged in clerical or office duties. The foregoing estimated compensation is offered for the purpose of computing the estimated premium and shall include the entire compensation (by which is meant all salaries, wages, or other sums paid for regular time, over-time, piece work or for allowances and also the cash equivalent of all board, merchandise, store certificates, credits or any other substitute for cash) earned by all the employees in the service of the Assured engaged in connection with the operations hereinbefore described.

Statement 6. No further exclusion shall be made from the pay-roll, except as herein stated No exceptions.

Statement 7. None of the special operations described will be covered unless the estimated average number of persons engaged in such special operations and their estimated compensation and the premium rate are specifically stated herein. No exceptions

Statement 8. No explosives are made, sold, kept, or used in the business described herein, except as herein stated No exceptions

Statement 9. No operations of any nature not herein disclosed are conducted by the Assured at the places covered hereby, except as herein stated No exceptions

Statement 10. The estimate of wages or other compensation does not include wages paid by independent sub-contractors, except as herein stated No exceptions

Statement 11. No similar insurance has been declined or cancelled by any Company during the three years last past, except as herein stated No exceptions

Statement 12. The minimum premium for this policy shall be Fifty and no/100ths Dollars ($ 50.00)

This policy is hereby surrendered and ordered cancelled this 15th day of Feb., 1910, releasing the company from all further obligations.

FRED G. MOCK,
Assured.

Defendant's Exhibit No. 4

Contractors' Employers' Liability Policy

No. 26472

Pennsylvania Casualty Company

THE

COAT OF ARMS—STATE OF PENNSYLVANIA

Issued to

Fred C. Mock

AGENCY OF

BRADLEY SHEPPARD
AGENT
BOISE IDAHO

Special attention is directed to the provisions of the Policy requiring immediate notice of all accidents, claims and suits.

READ YOUR POLICY CAREFULLY

ASSIGNMENT OF INTEREST BY ASSURED

The interest of.....

covered by this policy is hereby assigned to.....

subject to the consent of THE PENNSYLVANIA CASUALTY COMPANY, of Scranton, Pa.

Dated at.....this.....day of.....19....

.....

Signature of the Assured.

Wages estimated for term from.....19...., to.....19.... $.....

Wages expended for term from.....19...., to.....19.... $.....

Balance, $.....

It being understood and agreed, that $.....is the estimated wage expenditure for the remainder of the term of this policy, viz.: from.....19.... to .....19...., and the said..... Assignee agreeing to an adjustment as per Condition A of this Policy, THE PENNSYLVANIA CASUALTY COMPANY, hereby consents that the interest of.....

.....

covered by this Policy be assigned to.....

.....

Dated at Scranton, Pennsylvania, this

.....day .....

of.....19....

Secretary.

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

OCTOBER TERM, 1913.

PENNSYLVANIA CASUALTY COMPANY, PLAINTIFF IN ERROR,

vs.

A. S. WHITEWAY AND C. H. LEE, CO-PARTNERS AS A. S. WHITEWAY & COMPANY, DEFENDANTS IN ERROR.

UPON WRIT OF ERROR TO THE UNITED STATES DISTRICT COURT OF THE DISTRICT OF IDAHO, SOUTHERN DIVISION.

BRIEF OF DEFENDANTS IN ERROR

STATEMENT OF THE CASE.

On the first day of July, 1910, the plaintiff in error made, executed and delivered to the defendants in error a certain policy of insurance, a copy of which is set forth in the transcript as plaintiff's Exhibit Number One, under the terms of which it agreed: (1) To indemnify the Assured, subject to the limits expressed in Statement Four of the Declarations against loss by reason of the liability imposed upon him by law for damages on account of bodily injuries, including death at any time resulting from such injuries accidentally sustained during the period of this Policy by reason of the business operations described and conducted at the locations named in said Declarations by all employees

of the Assured as hereinafter provided; (2) To defend in the name and on behalf of the Assured any suits, even if groundless, which may at any time be brought on account of such injuries and to pay all costs taxed against the Assured under any legal proceedings defended by the Company, all expenses incurred in the investigation of such injuries and in the negotiations for settlement, all expense of the contest of claims arising therefrom, and all interest on such part of any judgment as shall not be in excess of the limits of the Company's liability as hereinafter expressed.

The policy was from June 27th, 1910, to June 27th, 1911. That while this policy was in full force and effect, one J. C. Irwin, in the employ of the defendants in error at the place mentioned in said policy of insurance, and while working thereat, received bodily injuries accidentally sustained, and that thereafter, on the 13th day of March, 1911, the said J. C. Irwin commenced an action in the District Court of the Third Judicial District of the State of Idaho against the defendants in error herein, to recover the sum of $15,656.00 as damages for said injuries accidentally sustained by said J. C. Irwin on the 25th day of July, 1910. That these defendants in error requested the plaintiff in error herein to defend said action in the name of and on behalf of the said defendants in error, and that said plaintiff in error herein neglected and refused to do so. That thereupon the defendants in error herein employed counsel, filed their answer, denying the material allegations of the said complaint of J. C. Irwin, and, the action coming on for trial, resulted in a verdict in favor of said J. C. Irwin and against the defendants in error herein for the sum of $7500. That on the 26th day of December, 1911, the defendants in error herein paid in money in satisfaction of said judgment the sum of five thousand dollars; that thereafter this present action was commenced in the state court to recover from

the said plaintiff in error, the said sum of five thousand dollars so paid as aforesaid by defendants in error, together with their attorney's fees and costs incurred in the prior action and for the costs of this suit. Upon application of the plaintiff in error, the case was transferred and removed to the United States District Court for the Southern Division of the District of Idaho for trial. A stipulation in writing having been filed waiving a jury, the case was tried to the judge without a jury. After having heard all the evidence in the case and the arguments of counsel thereon, the district judge rendered judgment in favor of the defendants in error herein for the said sum of five thousand dollars, attorney's fees and costs. From this judgment plaintiff in error has sued out this writ of error.

ARGUMENT.

Although the answer of the plaintiff in error set forth several matters by way of defense, upon the trial of the action, it rested upon the one question as to whether or not J. C. Irwin, the person who was injured, was a "steel" man, and covered by the terms of the policy, under that classification. The complaint alleged that he was a "steel" man and this allegation was denied by the answer. Evidence was taken upon this question and upon conflicting evidence, the trial court found as a fact that he was a "steel" man and therefore within the terms of the policy. This action being tried to the court without a jury, under a stipulation waiving the same, we contend that this finding of the trial court is conclusive. The question whether or not at the close of the trial there is substantial evidence to sustain a finding or judgment in favor of a party to the action is a question of law which arises in the progress of the trial. In a trial by the court without a jury, it is reviewable upon a motion for a judgment, a request for a declaration of law, or any other action in the trial court

which fairly presents this issue of law to that court for determination before the trial ends. The trial ends only when the finding is filed, and if no finding is filed before, when the judgment is rendered. There was no such request made by the plaintiff in error in this case. In the case of the United States Fidelity & Guaranty Company v. Board of Commissioners, 145 Fed. 144, on page 151, the Circuit Court of Appeals of the Eighth Circuit say:

> "The question whether or not at the close of a trial there is substantial evidence to sustain a finding in favor of a party to the action is a question of law which arises in the progress of the trial. In a trial to a jury it is reviewable on an exception to a ruling upon a request for a peremptory instruction. In a trial by the court without a jury it is reviewable upon a motion for a judgment, a request for a declaration of law, or any other action in the trial court which fairly presents this issue of law to that court for determination before the trial ends. The trial ends only when the finding is filed, or, if no finding is filed before, when the judgment is rendered. Clement v. Insurance Co., 7 Blatchf. 51, 53, 54, 58, Fed. Cas. No. 2,882; Merchantile Trust Co. v. Wood, 60 Fed. 346, 348, 8 C. C. A. 658, 659; St. Louis v. Western Union Tel. Co., 148 U. S. 92, 96, 13 Sup. Ct. 485, 37 L. Ed. 380; Ward v. Joslin, 186 U. S. 142, 147, 22 Sup. Ct. 807, 46 L. Ed. 1093; The Francis Wright, 105 U. S. 381, 387, 26 L. Ed. 1100; The City of New York, 147 U. S. 72, 76, 77, 13 Sup. Ct. 211, 37 L. Ed. 84; Laing v. Rigney, 160 U. S. 531, 540, 16 Sup. Ct. 366, 40 L. Ed. 525; Martinton v. Fairbanks, 112 U. S. 670, 672, 673, 5 Sup. Ct. 321, 28 L. Ed. 862; Dooley v. Pease, 180 U. S. 125, 131, 21 Sup. Ct., 329, 45 L. Ed. 457; Insurance Co. v. Folsom, 18 Wall. 237, 252, 21 L. Ed. 827; Hathaway v. Cambridge National Bank, 134 U. S. 494, 498, 10 Sup. Ct. 608, 33 L. Ed. 1004; Runkle v. Burnham, 153 U. S. 216, 225, 14 Sup. Ct. 837, 38 L. Ed. 694; Case Mfg. Co. v. Soxman, 138, U. S. 431, 438, 11 Sup. Ct. 360, 34 L. Ed. 1019. No motion, request or act of this nature is recorded in the case in hand, so that the

question of the sufficiency of the evidence to sustain the finding and judgment is not open for consideration in this court. Martinton v. Fairbanks, 112 U. S. 670, 672, 673, 5 Sup. Ct. 321, 28 L. Ed. 862; Dooley v. Pease, 180 U. S. 126, 131, 21 Sup. Ct. 329, 45 L. Ed. 457; Wilson v. Merchants' Loan & Trust Co., 183 U. S. 121, 127, 22 Sup. Ct. 55, 46 L. Ed. 113; Hoge v. Magnes, 85 Fed. 355, 358, 29 C. C. A. 564, 567; Barnard v. Randle 49 C. C. A. 177, 180, 110 Fed. 906, 909; York v. Washburn, 129 Fed. 564, 566, 64 C. C. A. 132, 134.

"The finding of the court was general and was in favor of the defendant. Like a verdict of a jury it concludes all issues of fact and all mixed questions of fact and law save the questions of law reserved by demurrer, motion, request, or exception. No questions of law were reserved which have not been considered and decided.

"The judgment below must therefore be affirmed, and it is so ordered."

See also Seep v. Ferris-Haggarty Copper Mining Co., 201 Fed. 893; National Surety Co. v. U. S. 200 Fed. 142.

Counsel for plaintiff in error, in their brief, have devoted considerable time and taken up a considerable portion of their brief in an effort to convince this court that J. C. Irwin, the party who was injured, was not covered by the terms of the policy but, as counsel made no request in the trial court for a direct ruling upon this question, under the authorities above cited, this court is now precluded from considering the question.

We desire to call the court's attention to the fact that plaintiff in error has set forth eleven assignments of error, and that the record discloses the fact that the only exception taken by counsel to the rulings of the court was the exception taken to the first assignment of error. It is true that counsel entered objections to the action of the court

in respect to the other ten assignments of error, but took no exception whatsoever to the ruling of the court. Therefore, we contend that these matters are not open for review in this court. We do find in the record that during the progress of the trial, the trial judge made the following remark: "I may say that you have exceptions to all adverse rulings of the court." It is hardly fair to presume that the court meant by this remark that it was unnecessary for counsel to ask for an exception to the rulings of the court, but that the court intended by such a remark that the court should grant without any request therefor an exception to each and every ruling during the progress of the trial and under the statute and rules of practice in the federal courts, as we understand them, the court would have no power to make such a rule; and that such was not the understanding of the parties we find on page 120 of the transcript that a "stipulation was entered into between counsel for the respective parties that all objections made and exceptions taken during the progress of the trial might be embodied in a bill of exceptions or statement on motion for a new trial, to be thereafter prepared, the same to have force and effect as if settled in a bill of exceptions upon the trial." Revised Statutes, Sec. 700 (U. S. Comp. St. 1901, p. 570) provides, among other things: "When an issue of fact in any civil cause in a circuit court is tried and determined by the court without the intervention of a jury * * * the rulings of the court in the progress of the trial of the case [redacted] *excepted to at the time* (italics are ours) and duly presented by a bill of exceptions may be reviewed by the supreme court upon a writ of error or upon appeal."

In the case of the Board of Commissioners v. Home Savings Bank, 200 Fed. 28, the Circuit Court of Appeals for the Eighth Circuit say:

"The office of an exception in practice is to challenge

the correctness of the rulings or decisions of the trial court promptly when made to the end that errors in such rulings may be corrected by the court itself, if, upon its attention being called thereto, it deems them to be erroneous and to lay the foundation for further review if necessary by the proper appellate tribunal. In the courts of the United States such exception taken immediately upon the ruling being made is indispensable to a review by the proper appellate court of the ruling. Railway Co. v. Heck, 102, U. S. 120, 26 L. Ed. 58; Newport News, etc. Co. v. Pace, 158 U. S. 36; Potter v. U. S. 122 Fed. 49."

In the case of Gibson v. Luther, 196 Fed. 203, the court say:

"As the trial progressed, objections of vital and controlling importance were interposed to the introductions of deeds and other documentary evidence, but these objections were not passed upon by the court, and no exceptions were saved by either party to any adverse ruling thereon. This precludes a review of any of these rulings, as we can act only on exceptions duly saved and assignments of error predicated thereon.

"There was an agreement between counsel that they might proceed with the introduction of their evidence, making formal objections as they went along, to such as they desired to object to, and 'that the court should reserve its ruling and take all matters up in the general argument.' Whether this agreement contemplated that the court should make definite rulings on the specific objections made or should make a comprehensive ruling after the final argument, in the judgment rendered, is uncertain. On this subject the agreement is not clear. It does not appear that the court consented to this arrangement of counsel. On the contrary, it appears that neither party ever asked or insisted that the court rule on the objections so made, and it appears that the court never did rule on them, except as its view of them might be inferred from the

judgment ultimately rendered in the case.

"Objections of this kind, unaccompanied by rulings or exceptions, present nothing for review by an appellate court. In the case of Ogden City v. Weaver, 47 C. C. A. 485, 488, 108 Fed. 564, 567, which was an action at law in which a former decree in a state court had been offered in evidence, Judge Thayer, speaking for this court, said:

> " 'The record and decree in the case pending in the state court seem to have been offered below; that is to say, by Ogden City. They were objected to at the time by the receiver, and the bill of exceptions recites that they were admitted 'subject to objection,' the trial court undertaking to rule on their admissibility afterwards. We are not advised by the bill of exceptions whether they were eventually admitted or rejected. Neither are we informed except by the opinion of the trial judge, which, as already stated, forms no part of the record, what the view of the trial court was with respect to the finality of the decree. In this condition of the record, we might well decline to notice the contention above stated,' etc.

"In the case of Fidelity & Casualty Co. v. Thompson, 83 C. C. A. 324, 325, 154 Fed. 484, 485, (11 L. R. A. (N. S.) 1069, 12 Ann. Cas. 181), in which two motions for a directed verdict were made, one at the close of plaintiff's evidence and the other at the close of all the evidence, Mr. Justice Van Devanter, then Circuit Judge, speaking for this court said:

> " 'The second motion was also waived, because a direct ruling thereon was not insisted upon, and no exception was reserved in that connection'—citing Newport News, etc. Co. v. Pace, 158 U. S. 36, 15 Sup. Ct. 743, 39 L. Ed. 887, and National Bank of Boyertown v. Schufelt, 76 C. C. A. 187, 145 Fed. 509.

"The doctrine of the foregoing cases is fully supported by the case cited from the Supreme Court (Newport

News, etc. v. Pace) wherein the late Chief Justice, speaking for that court, said:

> " 'Errors are assigned to the admission of evidence against defendant's objection, and notwithstanding objection by the defendant, but the bill of exceptions does not show any exception taken to the overruling of these objections. It is also claimed that in a particular instance evidence offered by defendant was improperly excluded on plaintiff's objection, but no exception to the action of the court appears to have been preserved.'
>
> "It thus appears that an objection in order to form the basis of an assignment of error must be pressed to the extent of securing a ruling upon it by the trial court. It is a ruling only that can be challenged, and as said by us recently in the case of Mexico International Land Co. v. Larkin, 195 Fed. 495, 115 C. C. A. ——, just decided:
>
> " 'The ruling of which complaint is made should be challenged, not only by an objection, but by an exception taken and recorded at the time, to the end that the attention of the trial judge may be sharply called to the question presented, and that a clear record of his action and its challenge may be made.' "

The court cannot take an exception on behalf of either party. Counsel must themselves take the exception at the time of the ruling of the court and it must affirmatively appear in the record that counsel "then and there excepted" to such ruling.

Walton v. United States, 9 Wheat. 651, 6 L. Ed. 182;

Brown v. Clarke, 4 How. 4, 11 L. Ed. 850;

Phelps v. Mayer, 15 How. 160, 14 L. Ed. 643;

Turner v. Yates, 16 How. 14, 14 L. Ed. 824;

United States v. Breitling, 20 How. 252; 15 L. Ed. 900;

Barton v. Forsyth, 20 How. 532, 15 L. Ed. 1012;

New Orleans etc. Ry. Co. v. Jopes, 142 U. S. 18, 35 L. Ed. 919.

The rule is well established and of long standing that an exception to be of any avail must be taken at the trial. It may be reduced to form and signed afterwards, but the fact that it was seasonably taken must appear affirmatively in the record by a bill of exceptions duly allowed or otherwise.

French v. Edwards, 13 Wall. 506, 20 L. Ed. 702;

Stanton v. Embrey, 93 U. S. 548, 23 L. Ed. 983;

Hunnicutt v. Peyton, 102 U. S. 333, 26 L. Ed. 113;

United States v. Carey, 110 U. S. 51, 52, 28 L. Ed. 67.

The trial court committed no error in permitting the witness Lee to testify as to what employees compensation was included in the payments $90.10 and $34.80, the premium which was paid to the plaintiff in error on its policy of insurance, for the reason: that the policy itself, in statement No. 4 contains the following provision: "This policy shall cover as above provided: (1) all such injuries sustained at the locations described in the declarations by all employees of the assured whose entire compensation is included in the estimated compensation as shown in Statement 3 of the declarations. (3) All such injuries sustained by drivers and their helpers, lumpers, stevedores, loaders, material handlers, time-keepers, pay-clerks and managers, whose entire compensation is included in the estimated compensation upon which the premium for this policy is computed, wherever they may be in the service of the assured in connection with the business operations described in the declaration."

Again, in Condition "A" of the policy of insurance it is stated as follows:

"A. The premium is based upon the entire compensation earned during the policy period by all employees of the Assured not herein elsewhere specifically excluded, engaged in connection with the operations described in and covered by this policy."

And statement 5 of the declarations of said policy again specifically states that the policy covers all employees in the service of the assured whose entire compensation is included for the purpose of estimating the premium on said policy.

That the court committed no error in permitting the witness Lee to testify as to what compensation was taken into consideration in estimating the premium due the company and that it committed no error in permitting the witness to testify that the said J. C. Irwin was a "steel" man, and thus within the express terms of the contract of insurance, has been decided by the Circuit Court of Appeals of the Seventh Circuit in the case of Fidelity & Casualty Co. of New York v. Phoenix Manufacturing Co., 100 Fed. 604. As the opinion of the court in this case is not lengthy, I will cite the same in full.

In the above case the court say:

> "Grosscup, Circuit Judge, after stating the facts, delivered the opinion of the court.
>
> "It is clear to us that at the time the contract for indemnity was entered into the defendant in error was engaged in a general business that included the tearing down of buildings preparatory to the construction of new ones; that the scope of its business in this particular was well known in the community; that the purpose of defendant in error in taking out the insurance was to obtain indemnity against losses by accident in this as well as in other lines of its general business; that the pay roll, made the basis for the premium rate, was meant to include the employes thus engaged;

and that the occupations described in the application were meant by the insured to include, and did include, the employes thus employed. This evidence was all submitted to the jury, and, though not specifically commented upon in the instructions of the court, must have entered into the deliberations and finding of the jury. Upon this evidence, if, indeed, not upon the face of the policy itself, the jury, in our opinion, was clearly justified in finding that the men injured—carpenters—were, at the time of the injury, engaged in one of the occupations covered by the policy of insurance. The trial in the circuit court seems to have gone off mainly upon the conception that clause 4 of the application, relating to the trade and business of the insured, controlled the scope of the insurance; and that, unless the occupations of the men injured were within a fair interpretation of such clause, the plaintiff in error would not be liable. This clause of the application does not, in our opinion, give substantial scope and effect to the insurance. At most it is only a clause of representation or warranty. If, in that attitude, it deceived, or was calculated to deceive, the insurance company, the policy might thereby be avoided; but the evidence submitted shows, and the jury, upon instructions certainly in favor of the insurance company, found, that the term 'general woodwork' was commonly understood to include the character of work upon which the employes injured were, at the time, engaged, and that at the time the policy was taken out the state agent of the insurance company, writing up the application, not only so interpreted it, but himself suggested it as a term broad enough to cover every line of business in which the defendant in error was then engaged. Whatever, therefore, may be the technical meaning of clause 4, the court was well within the authority of Insurance Co. v. Mahone, 21 Wall. 152, 22 L. Ed. 593, and Insurance Co. v. Baker, 94 U. S. 610, 24 L. Ed. 268, in holding that it was not necessarily unambiguous, and in submitting its meaning, as commonly understood, and as agreed upon by the parties, to the jury, as one of the questions of fact in the case. We see no error, in this respect, either

in the admission of the evidence objected to or in the instructions applied by the court. Indeed, looking upon this clause as one of representation only, and not as the clause of the application that gave scope to the insurance, the charge of the court appears to have been much more favorable to the plaintiff in error than, under our view of this case, it ought to have obtained. If the court below mistook clause 4,—a merely incidental issue,—as we view it, for the substantial issue in the case, the injury arising therefrom affected the insured, and not the insurer. If an error, it did not prejudice the case of the plaintiff in error.

"Nor was there any error in admitting the receipt for the excess premium, and in submitting it as one of the facts to the jury. It was clearly pertinent to show to what extent the parties understood the pay roll, as covering the employes injured in the accident.

"On the whole case, after a careful examination of all the evidence submitted, we are of the opinion that the defendant in error was entitled to recover upon the policy of insurance, that the verdict of the jury is clearly sustained, and that there was no error in the trial in the circuit court that in any degree prejudiced the cause of the plaintiff in error. The judgment will be affirmed."

The plaintiff in error set forth in its answer in this action as one of its defenses, the fact that A. S. Whiteway, one of the members of the co-partnership of A. S. Whiteway & Company, had accepted service of a notice of the accident to said J. C. Irwin and that by so doing he had violated the terms and conditions of the Insurance policy. This notice of accident is provided for by the statutes of Idaho, laws of 1909, Section 5. It applies solely to an action brought under this statute for injuries received. As a matter of fact, J. C. Irwin, in his complaint against A. S. Whiteway & Company, set forth three causes of action; two were based upon this statute and the third cause of action was the common

law action for injuries received. Upon the trial of this action in the district court counsel for A. S. Whiteway & Company moved the court to compel the plaintiff, J. C. Irwin, to elect upon which count he would ask for judgment, and he elected to stand upon the third cause of action stated in his complaint which was the common law action, and he recovered on said third count. This being true, the giving or receiving of this statutory notice in no wise affected injuriously or otherwise the plaintiff in error herein. These facts were shown in the trial court by the judgment roll, introduced in evidence of the trial of the action of J. C. Irwin against A. S. Whiteway & Company and by the introduction in evidence of plaintiff's Exhibit No. 8, a stipulation, found in the transcript herein at page 119. There can be no doubt that said J. C. Irwin had a right to waive the statutory cause of action and rely and recover upon the common law count. The statute of this state, enlarging the common law right of action for injuries, was taken from the statute of Massachusetts and has been construed by that state as not in any manner curtailing the common law right of action. In Ryalls v. Mechanics Mills, 150 Massachusetts, 190, the court, in the syllabi, say:

> "In these cases within the words of the employers' liability act, Statutes 1887, Chap. 270, in which the common law gives an injured employee a remedy against his employer, he may still sue under the same conditions and recover damages to the same extent as if the statute had not been passed.
>
> "The requirements of notice in Section 3 of such act only apply so far as Section 1 is concerned to the cases lying outside the common law rule, but embraced by Section 1, unless the plaintiff, although having the common law remedy, insists on relying upon the statute alone."

And in May v. Whittier, 27 N. E. 768, the same court say:

"Assuming for the sake of the argument that in some cases the plaintiff would have a right to go to the jury upon both a statutory and a common law count, in view of the different possible findings on his evidence (Ryalls v. Mechanics Mills, 150 Mass. 190, 22 N. E. 766; Whiteside v. Brawley, 152 Mass. 133), the plaintiff was not injured by being required to elect in the case at bar."

Clark v. Merchants & Miners Transportation Co., 24 N. E. 49.

And in the case of Denver & R. G. Ry. Co. v. Norgate, 141 Fed. 247, the Circuit Court of Appeals for the Eighth Circuit, in speaking of this act say:

"The right of Norgate to institute the present action against the railroad company existed at common law, and in regard to such action we do not understand that said section 4 of the act of 1893 applies. No mention is made in the complaint in this action of a statute of Colorado, and it ought not to be held that a statute enacted to enlarge the liability of the master has resulted in restricting it, unless such a result is unavoidable. In Ryalls v. Mechanics Mills, 150 Mass. 190, 22 N. E. 766, 5 L. R. A. 667, the Supreme Court of Massachusetts had occasion to construe a similar law of that state, and held that in those cases within the words of the statute in which the common law gives an employe a remedy, he still has a right to sue under the same conditions, and to recover damages to the same extent as if the statute had not been passed, and that the requirement in regard to notice only applied to those cases lying outside the common-law rule. We do not feel sure that the question as to the proper construction of the act of 1893 with reference to the point under discussion is an open one, as the Supreme Court of Colorado in Colorado M. & E. Co. v. Mitchell, 26 Colo. 285, 58 Pac. 28, construed said act, and held that it in no manner prejudiced the common-law rights of employes, or interfered with the enforcement of any right that the statute itself did not create. Massachu-

setts copied the statute from England, and Colorado from Massachusetts. At the place of its origin and adoption it has received the same construction."

The sixth assignment of error set forth in the brief of the plaintiff in which it is alleged that the court refused to allow the witnesses Hammond and Paradice to testify that a man doing such work as Irwin was doing at the time he was injured was generally and commonly known as a "common laborer" cannot be sustained, first, for the reason that no exception was taken at the time of the trial to the action of the trial court in regard to this matter; and second, the witness Hammond was permitted to answer all questions of the above character propounded to him by counsel for the plaintiff in error. In regard to the witness Paradice, upon an inspection of the record, the witness did testify as to his understanding of the term "steel-man" when used in regard to the erection of buildings, and was permitted to answer the same over the objection of counsel for the defendant in error (tr. p. 92). He also testified over the objection of counsel for the defendant in error as to his understanding of the term "common laborer" (tr. p. 92).

It is a cardinal rule in the construction of contracts that the court should, as far as possible, put itself in the place of the parties at the time the contract was entered into and find out, if possible, what was their intention in regard to any particular provision of said contract. Now, in this case, the uncontradicted evidence shows that technically speaking "steel-men" are not employed in the erection of buildings, but structural steel workers are, so that the only persons who could possibly come under the classification in this policy as "steel men" would be the structural steel workers. The witnesses Paradice and Dean, both called on behalf of the plaintiff in error, testified as follows:

"Q. Mr. Paradice, in the erection of buildings such as he stated, a four-story building in this city, do they

employ 'steel-men', structural steel-men? A. Structural steel-men.

"Q. You don't know of such a thing as a steel-man being employed in that particular trade. A. No, I do not." (tr. p. 93).

And the witness Dean testifies:

"Q. Do you know what the term steel-man or steel-men in the building trade or business signifies as a class of workmen? A. Structural steel erectors." (tr. p. 98).

We again desire to call the attention of the court to the case of the United States Fidelity & Guaranty Company v. Board of Commissioners, 145 Fed., at page 148, where the rule to govern a court in the construction of contracts of this character is stated as follows:

"A surety is a favorite of the law, and he is never liable beyond the strict terms of his obligation. But his contract is, after all, nothing but an agreement, and like all other agreements, it must have a just and rational interpretation. The purpose of every written contract is to express the intention of the parties. The object of all construction of agreements is to ascertain that intention to the end that it may be enforced. The court should, as far as possible, put itself in the place of the parties when their minds met upon the terms of the agreement, and then from a consideration of the writing itself, its purpose, and the circumstances which conditioned its making endeavor to ascertain what they intended to agree to do—upon what sense or meaning of the terms they used their minds actually met. Accumulator Co. v. Dubuque St. Ry. Co., 12 C. C. A. 37, 41, 42, 64 Fed. 70, 74; City of Salt Lake v. Smith, 104 Fed. 457, 462, 43 C. C. A. 637, 643; Fitzgerald v. First National Bank, 52 C. C. A. 276, 284, 114 Fed. 474, 482. That intention must be deduced not from specific provisions or fragmentary parts of the instrument, but from the entire agreement, because the intent is not evidenced by any part or provision of it, nor by the in-

strument without any part or provision, but by every part and term so construed as to be consistent with every other part and with the entire contract. Jacobs v. Spalding, 71 Wis. 177, 189, 36 N. W. 608; Boardman v. Reed, 6 Pet. 328, 8 L. Ed. 415; Canal Co. v. Hill, 15 Wall, 94, 21 L. Ed. 64; O'Brien v. Miller, 168 U. S. 287, 297, 18 Sup. Ct. 140, 42 L. Ed. 469; Pressed Steel Car Co. v. Eastern Ry. Co., 57 C. C. A. 635, 637, 121 Fed. 609, 611; Uinta Tunnel, etc., Co. v. Ajax Gold Min. Co., (C. C. A.) 141 Fed. 563. The actual intent of the parties when thus ascertained must prevail over the dry words, inapt expressions, and careless recitations in the contract, unless that intention is directly contrary to the plain sense of the binding words of the agreement. Pressed Steel Car. Co. v. Eastern Ry. Co., 57 C. C. A. 635, 637, 121 Fed. 609, 611; Uinta Tunnel, etc. Co. v. Ajax Gold Min. Co. (C. C. A.) 141 Fed. 563; Wilson v. Bevan, 62 Eng. Com. Law, 684; Lewis v. Tipton, 10 Ohio St. 88, 90, 75 Am. Dec. 498."

Respectively submitted,
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